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Evolution of Federal Lobbying Regulation: Where We are Now and Where We Should Be Going, The

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The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going

William V. Luneburg*

TABLE OF CONTENTS

I. INTRODUCTION	85
II. THE LOBBYING DISCLOSURE ACT AND ITS RELATIONSHIP TO OTHER LAWS DIRECTED AT LOBBYISTS.....	89
A. <i>The LDA as a Disclosure Regime</i>	89
B. <i>The Relationship of the LDA to Other Rules Regulating Lobbying</i>	103
1. <i>Reinforcement of Other Lobbying Law</i>	103
2. <i>Definitional Linkages</i>	110
a. <i>Congressional Gift and Post-Employment Restrictions</i>	110
b. <i>Lobbying with Appropriated Funds</i>	111
c. <i>Lobbyist Bundling of Campaign Contributions</i>	111
d. <i>Executive Order—Ethics Commitments by Executive Branch Personnel</i>	115
e. <i>Presidential Memorandum: Ensuring Responsible Spending of Recovery Act Funds</i>	117
f. <i>A Final Comment on Definitional Cross-Reference</i>	119
III. THE “GORILLA” IN THE CLOSET: THE INADEQUACY OF CURRENT ADMINISTRATION AND ENFORCEMENT	119
IV. CONCLUSION	130

I. INTRODUCTION

Lobbying on the federal level is *very* big business today, a fact that makes its regulation a matter of utmost importance in light of its actual and perceived impact on governmental decision-making. In this regard, some statistics tell the tale:

Lobbying firms and organizations registered to lobby on their own behalf^[1] reported receiving and spending a combined \$3.7 billion dollars on lobbying activities in 2008.

* Professor of Law, University of Pittsburgh School of Law. The author would like to thank Kathleen Clark, Rebecca H. Gordon, Craig Holman, and Thomas M. Susman, who offered invaluable comments and suggestions that greatly improved this Article.

1. For definitions of these terms, see 2 U.S.C. § 1602(7), (9) (2006).

Lobbying firms reported receiving [in income] nearly \$266 million in the fourth quarter of 2008, bringing their combined year-end total to approximately \$1.4 billion. Organizations registered to lobby on their own behalf reported spending \$562 million in the final quarter of 2008, and ended up spending nearly \$2.3 billion for the year.

The reported amount spent on lobbying in the fourth quarter was an increase from the third quarter, when lobbying firms reported receiving \$229 million in lobbying income, while organizations lobbying on their own behalf spent \$413 million.²

Not bad for a year when the economy was descending rapidly into a deep recession!

For almost half a century, from 1946 until 1995, federal lobbying law remained largely unchanged.³ Then various scandals unearthed starting in the late 1980s,⁴ followed by the anti-lobbyist rhetoric of the 1992 presidential campaign⁵ and a newly discovered enthusiasm for governmental reform,⁶ built an irresistible momentum to sweep away the old law and delivered the Lobbying Disclosure Act of 1995 (LDA). But transformation has not stopped there. That statute was amended first in 1998 to deal with various so-called “technical” issues,⁷ and then it was more extensively amended in 2007 by the Honest Leadership and Open Government Act (HLOGA),⁸ which represented the culmination of the efforts in

2. Lobbyists.info, *2008 Lobbying Figures*, THE GOV'T RELATIONS ALERT, Mar. 16, 2008 (on file with the *McGeorge Law Review*). These figures are compiled from reports filed under the Lobbying Disclosure Act of 1995. See *infra* text accompanying notes 57-58.

3. One exception was the enactment of the Byrd Amendment, Pub. L. No. 101-121, § 319, 103 Stat. 701, 750 (1989) (codified as amended at 31 U.S.C. § 1352 (2006)), which prohibits lobbying with appropriated monies and was one of the few instances where Congress grappled with lobbying reform prior to the passage of the Lobbying Disclosure Act of 1995. For more discussion of the Byrd Amendment, see *infra* text accompanying notes 150-51.

4. While interest in lobbying reform waxed and waned during the 1950s, 1960s, and 1970s (with the desire for reform peaking during the Watergate years), congressional review of the adequacy of federal lobbying law that resulted in the enactment of the Lobbying Disclosure Act started in 1987 with a Senate subcommittee's investigation of the award of federal contracts to Wedtech Corporation. The company had hired numerous well-connected lobbyists to help in obtaining favored treatment; in the process, various “program irregularities” arose as a result of the lobbying. See S. REP. NO. 103-37, at 19 (1993).

5. H. Ross Perot, as a surprisingly strong third-party candidate in 1992, focused on the allegedly baneful influence of lobbyists. See, e.g., Bill Clinton et al., First Clinton-Bush-Perot Presidential Debate (Oct. 11, 1992), available at <http://www.presidency.ucsb.edu/showdebate.php?debateid=15> (on file with the *McGeorge Law Review*). Candidate Perot noted, for instance: “I think the principal [sic] that separates me is that 5 and a half million people came together on their own and put me on the ballot. . . . I was not put on the ballot by any PAC money, by any foreign lobbyist money, [or] by any special interest money.” *Id.*

6. See, e.g., Republican Contract with America, <http://www.house.gov/house/Contract/CONTRACT.html> (last visited July 28, 2009) (on file with the *McGeorge Law Review*); see also Craig Holman, *Origins, Evolution and Structure of the Lobbying Disclosure Act*, May 11, 2006, <http://www.citizen.org/documents/Origins%20of%20Lobbying%20Disclosure%20Act.pdf> (on file with the *McGeorge Law Review*).

7. Pub. L. No. 105-166, 112 Stat. 38, 38 (1998) (codified in scattered sections of 2 U.S.C. §§ 1601-1614 (2006)).

8. Pub. L. No. 110-81, § 1(a), 121 Stat. 735 (2007) (codified in scattered sections of 2 U.S.C. §§ 1601-

Congress to react to the series of scandals associated with Republican lobbyist, Jack Abramoff.⁹ Indeed, unlike many Washington political “events” which explode into public view, capture headlines for a week or two, and then are forgotten, the now heightened perception and portrayal of lobbyists as threats to the public good persisted throughout the presidential election of 2008.¹⁰ During the first nine months of the Obama Administration, this perception resulted in one executive order¹¹ and other actions to limit the influence of lobbyists.¹² For better or ill, lobbying and lobbyists are now under a dark cloud of suspicion that is likely to remain for the foreseeable future.

There is, of course, nothing inherently wrong with lobbying the government for policy and other changes or with the persons who make their living in representing individuals, private entities, and coalitions in that endeavor. The First Amendment protects the historic right, originating in English law,¹³ “to petition the [g]overnment for a redress of grievances.”¹⁴ We justly celebrate the other rights embraced within that Amendment as vital to our democracy as we know it. While lobbying obviously involves the right of free speech, the right to petition actually presents a closer analogy to what lobbyists have always done

1614 (2006)).

9. Abramoff was sentenced to five years and ten months in prison on March 29, 2006, after pleading guilty to charges of fraud, tax evasion, and conspiracy to bribe public officials. *The Washington Post* covered the developments in detail with reporters Susan Schmidt, James V. Grimaldi, and R. Jeffrey Smith, who together won the 2006 Pulitzer Prize for their efforts. Those stories and a rich store of other information on the Abramoff scandals are found on the Washington Post’s website. See Susan Schmidt et al., *Investigating Abramoff—Special Report*, <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html> (last visited June 2, 2009) (on file with the *McGeorge Law Review*).

10. See Carrie Budoff Brown, *Obama Seizes on McCain Lobbyist Ties*, POLITICO, May 19, 2008, <http://www.politico.com/news/stories/0508/10452.html> (on file with the *McGeorge Law Review*) (“Democrat Barack Obama on Monday seized upon John McCain’s efforts to shed his campaign of lobbyist ties, saying the Republican’s campaign ‘is being run by Washington lobbyists and paid for with their money.’”).

11. Exec. Order No. 13,490, 74 Fed. Reg. 4673, 4673-4678 (Jan. 21, 2009), discussed *infra* in text accompanying notes 172-81.

12. See *infra* text accompanying notes 182-94.

A Harris poll released on March 12, 2009 reported:

When one thinks of Washington D.C. and the power corridors, smoke filled rooms and shady deals with lobbyists may come to mind. There are certain groups which are singled out by large majorities of the American public as having too much power in influencing the government. Influencers leading the list are big companies and Political Action Committees (PACs), which give money to political candidates. Eighty-five percent of Americans see them both as having too much influence.

Large majorities also believe that political lobbyists (81%) and the news media (75%) have too much power. . . .

Press Release, Business Wire, Very Large Majorities of Americans Believe Big Companies, PACs, Political Lobbyists and the News Media Have Too Much Power and Influence in D.C. (Mar. 12, 2009), available at <http://www.reuters.com/article/pressRelease/idUS88732+12-Mar-2009+BW20090312> (on file with the *McGeorge Law Review*).

13. See, e.g., Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 741 (1999).

14. U.S. CONST. amend. I.

and still do on behalf of those whom they represent. At least at one level, therefore, we should praise the work of lobbyists as the work of a free, diverse people engaged with the government that they created and seeking to insure that it represents their interests.

A problem arises when we direct our attention to the methods of “petitioning.” Bribes and gratuities to influence official action have long been unlawful,¹⁵ though often hard to prove in actual prosecutions.¹⁶ Rightly or wrongly, campaign contributions and gifts to officeholders, where they lack the technical characteristics of those criminal offenses, have been tolerated to a greater degree despite the influence they may have on officeholders’ decisions or, at least, the access they may afford lobbyists to decision-makers for the purpose of making the lobbying “pitch.” Yet, increasingly, even these methods of imparting persuasive force to the lobbyist’s arguments have provoked both concern and regulation.¹⁷ One of the more important trends in federal lobbying regulation is its expansion to include the areas of campaign finance and congressional gift and travel rules. The enactment of HLOGA in 2007 was a watershed in that regard; lobbying disclosure was no longer concerned exclusively with the contours of lobbying campaigns, but rather its focus expanded to include lobbyists’ activities that could increase both their leverage and access from which to build successful campaigns for their clients.¹⁸

The history of how lobbying regulation has matured to this point in time is a fascinating one: the false starts, the twists and often odd turns, the search for political advantage despite the bipartisan nature of the final votes on passage of the LDA and its amendments, along with the colorful characters that make cameo appearances along the way. But this is not the place to recount that story.¹⁹ Rather, it is important here to lay out the current nature of lobbying regulation under the LDA, how it now implicates other areas of the overall regime applicable to federal lobbying activities, and how effective the LDA is today in

15. 18 U.S.C. § 201(b)(1)-(3), (c)(1)-(2) (2006) (originally codified by Pub. L. No. 87-849 in 1962).

16. See, e.g., *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999) (“[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.”).

17. For an overview of the history of congressional gift regulation and a detailed discussion of current rules, see Robert F. Bauer & Rebecca H. Gordon, *Congressional Ethics: Gifts, Travel, Income and Post-Employment Restrictions*, in *THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE* 477-511 (William V. Luneburg, Thomas M. Susman & Rebecca H. Gordon eds., 4th ed. 2009) [hereinafter *THE LOBBYING MANUAL*].

18. For a discussion of the reporting obligations related to lobbyist involvement in political campaigns, see *infra* text accompanying notes 84-89, 138-45, and 152-71. For the application of congressional gift and travel rules, see *infra* text accompanying notes 105-23 and 146-48.

19. Those interested in that history should consult, for example, William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, in *THE LOBBYING MANUAL*, *supra* note 17, at 5-21, and Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals Since 1955*, in *THE LOBBYING MANUAL*, *supra* note 17, at 23-42.

achieving both its purposes and those underlying the other restrictions that apply to lobbyists.

As we will see, the LDA functions as a regulatory statute in its own right, with disclosure as the primary method of controlling and conditioning behavior. The LDA also functions to reinforce other regulatory regimes that are relevant to curbing lobbying abuses. Finally, it provides the definitional touchstone that triggers the application of various requirements and restrictions that are designed to limit the perceived baneful influence of lobbyists on governmental decision-making. Playing these distinct roles, the LDA is central to effective lobbying regulation today.

At the same time, the administration and enforcement of the LDA is suboptimal. If one change could be effected that would have more impact than any other, it would be to vest those responsibilities in a special agency outside of Congress and not under the “thumb” of the President. In that connection, reformers should also consider statutory authorization of citizen suits or *qui tam* actions for those cases where governmental enforcement is not forthcoming. Other statutory changes should be made to improve the LDA’s disclosure regime and to extend its role in support of the effectiveness of lobbying law; those potential changes will also be discussed below.²⁰

II. THE LOBBYING DISCLOSURE ACT AND ITS RELATIONSHIP TO OTHER LAWS DIRECTED AT LOBBYISTS

A. *The LDA as a Disclosure Regime*

When enacting the LDA in 1995, Congress made three findings:

- (1) responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decision-making

20. One change that is not discussed in this Article is the imposition of statutory limitations on lobbyist involvement in campaign fundraising, whether through making individual contributions, serving as board members of political action committees with power to disperse funds to candidates, or serving as “bundlers” of campaign contributions made by others. The symbiotic relationship that has developed between lobbyists and politicians and that revolves around money flowing into the political arena is a matter of grave concern. One of the most compelling treatments of this and related changes in the political environment over the last forty years is found in ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* (2009). For a discussion of state laws that place limitations on lobbyist political contributions and the likelihood of future federal limitations, see Joseph E. Sandler, *Lobbyists and Election Law: The New Challenge*, in *THE LOBBYING MANUAL*, *supra* note 17, at 751-67. While the LDA does concern itself with the lobbyist-money-politician nexus by, for example, making the congressional gift rules legally binding on lobbyists, the imposition of limitations on lobbyist involvement in raising money for federal political campaigns will come not as amendment to the LDA—the focus of this Article—but rather as an amendment to the Federal Election Campaign Act or other law. See generally Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105 (2008); Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good*, 19 STAN. L. & POL’Y REV. 10 (2008).

process in both the legislative and executive branches of the Federal Government;

(2) existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose; and

(3) the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.²¹

More succinctly stated, transparency applied to lobbying Congress and the executive branch will allow the voters to hold legislators and bureaucrats accountable for their official actions in response to the entreaties of lobbyists; indeed, it might have the prophylactic effect of deterring what would be illegal or otherwise inappropriate conduct. As enacted in 1995, the LDA was a disclosure regime pure and simple—arguably the least “intrusive” of regulatory techniques, a choice dictated in part by the First Amendment protection of lobbying activity.²²

Disclosure under the statute follows, however, only if registration is required with the Secretary of the Senate and Clerk of the House of Representatives,²³ who administer the statute²⁴ but do not enforce it in the courts, a task left to the United States Attorney for the District of Columbia.²⁵ Registration requires, first of all, that a client employ a “lobbyist” within the meaning of the LDA.²⁶ That term does not include individuals who lobby on their own behalf, nor does it include volunteers who are not compensated for their lobbying activities. Rather, a lobbyist is “any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact.”²⁷ The “lobbying activities” must also consume at least twenty percent of the person’s time serving that client over a three-month period in order for the definition to apply (hereafter referred to as “the twenty-percent requirement”).²⁸ A “lobbying contact” is a communication with “covered officials.”²⁹ Covered officials are members of Congress and staff, along with designated executive

21. 2 U.S.C. § 1601(1)-(3) (2006).

22. See *United States v. Harriss*, 347 U.S. 612, 621-23 (1954) (upholding, but narrowly construing, the 1946 Federal Regulation of Lobbying Act in the face of a First Amendment challenge).

23. 2 U.S.C.A. § 1603(a)(1) (West Supp. 2009).

24. *Id.* § 1605.

25. *Id.* § 1605(a)(8).

26. *Id.* § 1603(a)(1).

27. *Id.* § 1602(10).

28. *Id.*

29. 2 U.S.C. § 1602(8)(A) (2006).

branch officials, including so-called Schedule C employees occupying confidential policymaking or advocating roles.³⁰ A communication is not a lobbying contact when that communication falls within one of nineteen statutory exceptions.³¹ A non-excepted communication can relate to almost anything the federal government does.³² Though not expressly stated in the LDA, arguably the underlying motivation for the communication must be more than simply to provide information to covered officials; rather, it must include the desire to influence how they perform their official responsibilities. “Lobbying activities” include not only lobbying contacts, but also activities that are intended to support lobbying contacts, such as strategy sessions with clients.³³ As a practical matter, the twenty-percent requirement may, in many cases, be the most important screening device separating LDA lobbyists from what might be called non-LDA lobbyists (that is, those people who lobby, but do not satisfy the LDA’s definition of lobbyist): a person can do a lot of lobbying for a client and still not be an LDA lobbyist for that client.

The second threshold requirement is that the lobbying activities for the client earn income or require expenditures in excess of certain monetary thresholds.³⁴ At this point, the LDA makes an important distinction between “lobbying firms”³⁵ whose employee-lobbyists provide services to others (which can include self-employed lobbyists), on the one hand, and organizations employing lobbyists who lobby on behalf of their employer (self-lobbying organizations), on the other hand.³⁶ For instance, a “lobbying firm” could include a law firm or an entity associated with the firm to provide lobbying services to others. A self-lobbying organization could include a major corporation, a union, an association of professionals, or a coalition of persons or entities, whether or not formally organized.

For a lobbying firm, the second threshold requirement focuses on its income from lobbying activities for each of its clients with respect to which the firm employs an LDA-defined lobbyist: if it earns or is expected to earn more than \$3,000 in a three-month period from lobbying activities on behalf of the client, it must register *for that client*.³⁷ Registration requirements for firms apply on a

30. *Id.* § 1602(3) (“covered executive branch official”), (4) (“covered legislative branch official”).

31. *Id.* § 1602(8)(B)(i)-(xix). Such exceptions include, for example, congressional testimony and written comments filed in administrative rulemakings. *Id.*

32. *See id.* § 1602(8)(A)(i)-(iv) (defining “lobbying contacts” as any communication “with regard to” almost any governmental function).

33. *Id.* § 1602(7) (defining “lobbying activities” as “lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others”).

34. 2 U.S.C.A. § 1603(a) (West Supp. 2009).

35. 2 U.S.C. § 1602(9).

36. 2 U.S.C.A. § 1603(a)(3)(A)(ii) (West Supp. 2009).

37. *Id.* § 1603(a)(3)(A)(i). In January 2009, the statutory threshold was increased from \$2,500 to \$3,000 based on the Consumer Price Index; *see* 2 U.S.C. § 1603(a)(3)(B)(ii) (2006); OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, LOBBYING DISCLOSURE ACT GUIDANCE 5 (revised June 9, 2009), *available at*

client-by-client basis:³⁸ an individual may be a lobbyist for one firm client and not for another based, for example, on the twenty-percent requirement and, similarly, the income threshold may be met for one client and not for another. For self-lobbying organizations, the monetary threshold is \$11,500 in expenses for lobbying activities incurred or expected over a three-month period.³⁹

In today's professional services market, billable time for a client for lobbying work may quickly add up to the threshold amount. Similarly, a modest lobbying campaign by a self-lobbying organization can easily cost in excess of \$11,500, even if it does not involve grassroots or other time-intensive work.

At this point it should be noted that one of the big "holes" in the LDA disclosure scheme is its lack of coverage of grassroots advocacy seeking to generate "public" support for the client's favored policy. While attempts were made in both 1995 and 2007 to include grassroots lobbying, those efforts failed despite the crucial role that technique plays in modern lobbying campaigns.⁴⁰ Those failures were due, in part, to objections based on the First Amendment; also implicated were concerns among some legislators over reducing the political power of various sectors of the voting public who might otherwise be supportive of their political fortunes.⁴¹

Where registration is required, it is the employing organization that registers, not the individual employees who are lobbyists (even the self-employed lobbyist registers as a lobbying firm).⁴² It is, nevertheless, commonplace to find references in rules, executive orders, and elsewhere to "registered lobbyists."⁴³ As enacted in 1995, the LDA required the filing by the registrant of two forms, the registration statement itself (known as an LD-1)⁴⁴ and a semiannual (after HLOGA in 2007, a quarterly) report of lobbying activities (the LD-2),⁴⁵ one function of which is to update the information contained in the registration.⁴⁶ All of these must now be filed electronically with the Secretary of the Senate and Clerk of the House of

<http://lobbyingdisclosure.house.gov/index.html> [hereinafter LOBBYING DISCLOSURE ACT GUIDANCE] (on file with the *McGeorge Law Review*).

38. 2 U.S.C. § 1603(c)(1) (2006).

39. 2 U.S.C.A. § 1603(a)(3)(A)(ii) (West Supp. 2009). In January 2009, the statutory threshold was increased from \$10,000 to \$11,500 based on the Consumer Price Index. LOBBYING DISCLOSURE ACT GUIDANCE, *supra* note 37, at 5.

40. See Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals Since 1955*, in THE LOBBYING MANUAL, *supra* note 17, at 31, 36.

41. *Id.* at 36; see also, Editorial, *McCain Sees the Light*, N.Y. SUN, Jan. 23, 2007, available at <http://www.nysun.com/editorials/mccain-sees-the-light/47201>.

42. 2 U.S.C. § 1603(a)(2) (2006).

43. See, e.g., *infra* text accompanying notes 187-92. It should be noted, however, that the title of the registration provision of the LDA is "Registration of lobbyists," see 2 U.S.C. § 1603 (2006), and the provision requiring periodic reports is entitled "Reports by registered lobbyists." *Id.* § 1604 (2006).

44. 2 U.S.C.A. § 1603(b) (West Supp. 2009).

45. *Id.* § 1604.

46. *Id.* § 1604(b)(1).

Representatives⁴⁷ to speed up the process of making the information publicly available on the Internet in a “searchable, sortable, and downloadable” database.⁴⁸

The LD-1 provides basic information with regard to the registrant and the client (in the case of self-lobbying organizations they are the same).⁴⁹ Beyond that, the form must list the employees of the registrant who are expected to act as “lobbyists” for the client, within the meaning of the LDA, along with an identification of covered legislative and executive branch positions held by those individuals within the preceding twenty years;⁵⁰ the “general issue areas” of expected lobbying activities (e.g., Agriculture);⁵¹ and the “specific issues” that are likely to be addressed by those activities.⁵² As it turns out, “specific” is not a terribly demanding standard in this context.⁵³ In many ways, the most informative part of the LD-1 is that which identifies (1) any organization that contributes more than \$5,000 during a quarterly period to support the lobbying activities of the registrant where that organization also “actively participates in the planning, supervision, or control” of those lobbying activities (“affiliated organizations”)⁵⁴ and (2) any foreign entity⁵⁵ that “in whole or major part, plans, supervises, controls, directs, finances, or subsidizes” the lobbying activities of either the client or any identified “affiliated organization” or that is otherwise closely associated (e.g., through stock ownership) with the client or affiliated organization.⁵⁶

47. *Id.* § 1604(e). Despite the “plain language” of this provision referring to “reports” only, the Secretary and Clerk have construed subsection (e) to apply to both registrations and reports. LOBBYING DISCLOSURE ACT GUIDANCE, *supra* note 37, at 13.

48. 2 U.S.C.A. § 1605(a)(4), (9) (West Supp. 2009).

49. *Id.* § 1603(b).

50. *Id.* § 1603(b)(6).

51. *Id.* § 1603(b)(5)(A).

52. *Id.* § 1603(b)(5)(B).

53. In the case of legislation, this requirement is satisfied by the bill number, the name of the bill, and a reference to the specific sections of the bill as to which lobbying activities will be directed. *See* LOBBYING DISCLOSURE ACT GUIDANCE, *supra* note 37, at 16 (dealing with quarterly reports, but equally applicable to registration statements). There is little guidance offered regarding the necessary description of executive branch actions that are the subject of lobbying efforts. *Id.*

54. 2 U.S.C.A. § 1603(b)(3) (West Supp. 2009). In explaining the change effected to this provision in 2007 by HLOGA to broaden disclosure from those organizations that “in major part” control lobbying campaigns, the Statement of the Senate Managers noted: “The bill closes a loophole that has allowed so-called ‘stealth coalitions,’ often with innocuous-sounding names, to operate without identifying the interests engaged in the lobbying activities.” 153 CONG. REC. S10708, S10709 (daily ed. Aug. 2, 2007). The constitutionality of this provision under the First Amendment was unsuccessfully challenged in *National Association of Manufacturers v. Taylor*, No. 08-5085, 2009 WL 2851387 (D.C. Cir. Sept. 8, 2009).

55. This term is defined by reference to the Foreign Agents Registration Act, 22 U.S.C. § 611(b) (2006). *See* 2 U.S.C. § 1602(6) (2006) (“The term ‘foreign entity’ means a foreign principal (as defined in section 1(b) of the Foreign Agents Registration Act of 1938).”).

56. 2 U.S.C.A. § 1603(b)(4)(B) (West Supp. 2009).

In terms of the content of specific lobbying campaigns that take place, the more important form is the LD-2. For lobbying firms, the LD-2 requires disclosure of the total lobbying income earned from lobbying activities on behalf of the client during a quarterly period, including amounts paid by third parties other than the client.⁵⁷ For self-lobbying organizations, the LD-2 requires disclosure of the expenses incurred for lobbying activities during the reporting period, including fees paid to lobbying firms to lobby on the organization's behalf.⁵⁸ There may be multiple lobbying campaigns on-going at the same time, but the reported figures are not broken down by general issue area, let alone specific issue. Moreover, the only time there is need for the registrant to provide further information, other than to update the registration, is when a lobbyist-employee of the registrant is engaged in lobbying activities during the covered period for the client.⁵⁹ If such activity does occur, the LD-2 breaks the activities down by very general subject matter areas (e.g., "Transportation").⁶⁰ For each of those areas, the specific issues lobbied by a lobbyist-employee must be identified⁶¹ along with lobbyists active in the general topic area during the period, including those who qualified as lobbyists under the twenty-percent requirement for the first time during that period.⁶² If one of the listed lobbyists made a lobbying contact during the period with the House of Representatives, the Senate, or a federal agency, the contacted entity must be identified,⁶³ but the specific congressional committee, Member of Congress, or name of congressional or agency staff who was party to the communication need not be identified, let alone the content of the communication. Finally, if a foreign entity listed in the registration statement had an interest in the specific issues lobbied, the interest must be identified.⁶⁴

The registration update portion of the LD-2 requires deleting the names of organizations and foreign entities that no longer meet the requirements for disclosure on the registration form and also the listing of organizations and foreign entities that newly qualify for disclosure.⁶⁵ Finally, individuals who are no longer expected to act as lobbyist-employees for the registrant are listed in the update portion.⁶⁶ After 2007, this part of the LD-2 has significant ramifications in

57. *Id.* § 1604(b)(3).

58. *Id.* § 1604(b)(4).

59. *Id.* § 1604(b)(2)(A)-(D) (so conditioning each disclosure).

60. *Id.* § 1604(b)(2).

61. 2 U.S.C.A. § 1604(b)(2)(A) (West Supp. 2009).

62. *Id.* § 1604(b)(2)(C).

63. *Id.* § 1604(b)(2)(B).

64. *Id.* § 1604(b)(2)(D).

65. LOBBYING DISCLOSURE ELECTRONIC FILING: LOBBY REGISTRATION AND REPORTING SYSTEM, WINDOWS USER MANUAL 7 (2009), http://lobbyingdisclosure.house.gov/ld_user_guide.pdf (on file with the *McGeorge Law Review*). Updates to the registration form are required by 2 U.S.C.A. § 1604(b)(1) (West Supp. 2009).

66. LOBBYING DISCLOSURE ELECTRONIC FILING, *supra* note 65, at 7.

terms of relieving previously listed, but now “de-listed,” lobbyists from, for example, disclosure obligations under section 203 of the LDA and recent Obama Administration lobbying restrictions,⁶⁷ as well as relieving political committees from their obligation under the Federal Election Campaign Act of 1971, as amended by HLOGA,⁶⁸ to report “bundling” of campaign contributions by lobbyists.

It is important to get a sense of what an actual LD-2 looks like. Here is part of one filed by the Ford Motor Company as a registrant self-lobbying organization.

67. *See infra* text accompanying notes 81-89 and 172-94.

68. *See infra* text accompanying notes 153-71.

<p>Clerk of the House of Representatives Legislative Resource Center B-106 Cannon Building Washington, DC 20515 http://lobbyingdisclosure.house.gov</p>	<p>Secretary of the Senate Office of Public Records 232 Hart Building Washington, DC 20510 http://www.senate.gov/lobby</p>
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LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - All Filers Are Required to Complete This Page

1. Registrant Name <input checked="" type="checkbox"/> Organization/Lobbying Firm <input type="checkbox"/> Self Employed Individual <div style="text-align: center; font-weight: bold; font-size: 1.2em;">FORD MOTOR COMPANY</div>	
2. Address <input checked="" type="checkbox"/> Check if different than previously reported Address1 <u>1350 Eye Street, NW</u> Address2 <u>Suite 450</u> City <u>Washington</u> State <u>DC</u> Zip Code <u>20005</u> Country <u>USA</u>	
3. Principal place of business (if different than line 2) City <u>Dearborn</u> State <u>MI</u> Zip Code <u>48126</u> Country <u>USA</u>	
4a. Contact Name ELIZABETH BRAKEBILL	5. Senate ID# 15133-12
b. Telephone Number <input type="checkbox"/> International Number (202) 962-5457	c. E-mail ebrakeb1@ford.com
7. Client Name <input checked="" type="checkbox"/> Self <input type="checkbox"/> Check if client is a state or local government or instrumentality FORD MOTOR COMPANY	6. House ID# 309160000

TYPE OF REPORT 8. Year 2008 Q1 (1/1 - 3/31) ☐ Q2 (4/1 - 6/30) ☐ Q3 (7/1-9/30) ☐ Q4 (10/1 - 12/31) ☒

9. Check if this filing amends a previously filed version of this report ☐

10. Check if this is a Termination Report ☐ Termination Date _____ 11. No Lobbying Issue Activity ☐

INCOME OR EXPENSES - YOU MUST complete either Line 12 or Line 13	
<p style="text-align: center;">12. Lobbying</p> <p>INCOME relating to lobbying activities for this reporting period was:</p> <p><u>Less than \$5,000</u> <input type="checkbox"/></p> <p><u>\$5,000 or more</u> <input type="checkbox"/> \$ _____</p> <p><small>Provide a good faith estimate, rounded to the nearest \$10,000, of all lobbying related income from the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).</small></p>	<p style="text-align: center;">13. Organizations</p> <p>EXPENSE relating to lobbying activities for this reporting period were:</p> <p><u>Less than \$5,000</u> <input type="checkbox"/></p> <p><u>\$5,000 or more</u> <input checked="" type="checkbox"/> \$ \$ <u>1,925,000.00</u></p> <p>14. REPORTING Check box to indicate expense accounting method. See instructions for description of options.</p> <p><input type="checkbox"/> Method A. Reporting amounts using LDA definitions only</p> <p><input type="checkbox"/> Method B. Reporting amounts under section 6033(b)(8) of the Internal Revenue Code</p> <p><input checked="" type="checkbox"/> Method C. Reporting amounts under section 162(e) of the Internal Revenue Code</p>

Signature Filed Electronically **Date** 01/19/2009

Printed Name and Title Elizabeth Brakebill, Legislative Analyst, Ford Motor Company

v6.8.1f Page 1 of 27

Registrant	FORD MOTOR COMPANY	Client Name	FORD MOTOR COMPANY
------------	---------------------------	-------------	---------------------------

LOBBYING ACTIVITY. Select as many codes as necessary to reflect the general issue areas in which the registrant engaged in lobbying on behalf of the client during the reporting period. Using a separate page for each code, provide information as requested. Add additional page(s) as needed.

15. General issue area code **AUT** **AUTOMOTIVE INDUSTRY** (one per page)

16. Specific lobbying issues

HR 5312, Automobile Arbitration Fairness Act of 2008, provisions regarding limitations on arbitration agreements

HR 5734, The Pedestrian Safety Enhancement Act of 2008, provisions regarding new regulations pertaining to noise levels for new hybrid vehicles

17. House(s) of Congress and Federal agencies ☐ Check if None

U.S. HOUSE OF REPRESENTATIVES, U.S. SENATE, Energy - Dept of, Transportation - Dept of (DOT), White House Office

18. Name of each individual who acted as a lobbyist in this issue area

First Name	Last Name	Suffix	Covered Official Position (if applicable)	New
Ziad	Ojakli			<input type="checkbox"/>
Bruce	Andrews			<input type="checkbox"/>
Peter	Arapis			<input type="checkbox"/>
Alison	Jones			<input type="checkbox"/>
Jay	Morgan			<input type="checkbox"/>
Jerry	Rousset			<input type="checkbox"/>
JT	Young			<input type="checkbox"/>
				<input type="checkbox"/>
				<input type="checkbox"/>

19. Interest of each foreign entity in the specific issues listed on line 16 above ☒ Check if None

Printed Name and Title **Elizabeth Brakebill, Legislative Analyst, Ford Motor Company**

v6.0.1f Page 2 of 27

ADDENDUM for General Lobbying Issue Area: AUT - AUTOMOTIVE INDUSTRY

S 1782/ HR 3010, Arbitration Act of 2007, provisions regarding limitations on arbitration agreements

S 3258, FY09 Energy and Water Approps, Manufacturing Incentive Program and Advanced Technology Vehicles

H Res 964, Fifteen Passenger Van Safety

HR 2638, Continuing Resolution, Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009,
Department of Energy Advanced Technology Manufacturing Incentives Program and Direct loans for automakers and suppliers

Motor Vehicle and Passenger Safety Issues

Fleet Modernization Proposals

Printed Name and Title Elizabeth Brakebill, Legislative Analyst, Ford Motor Company

6.8.11

Page 3 of 27

A close examination of this form shows how uninformative an LD-2 can be. These are three pages from a twenty-seven-page report. The first page, on Line 13, reports the aggregated total expenses incurred by Ford during the reporting period for all of the lobbying activities covered by this LD-2.⁶⁹ Then follow pages grouped by the general subject matter areas lobbied. In the excerpted parts of the LD-2 above, only one of those areas is covered, that for the “Automotive Industry” category (no surprises there!). As Line 16 of the addendum shows, there were multiple “specific” issues (note the degree of specificity, or lack thereof) towards which the lobbyists, as identified on Line 18, conducted lobbying activities. Some of that activity involved lobbying contacts with the House, Senate, White House, Department of Energy, and Department of Transportation. No foreign entities listed on the LD-1 for Ford, if there were any, had any interest in any of those issues.

This is all we know about the various lobbying campaigns covered by this part of the LD-2. For example, we do not know which of the listed lobbyists lobbied which of the specific issues identified; nor do we know which lobbyists made one (or more) lobbying contacts or with which of the legislative and administrative entities identified.

The drafters of the LDA wanted to avoid the detailed, and arguably obfuscating, type of listing (e.g., cab fares) purportedly required by the old Federal Regulation of Lobbying Act of 1946 (FRLA) that was repealed by the LDA, and, rather, put the focus of attention on who is lobbying, for whom, on what issues, and at what cost.⁷⁰ This is fairly basic information as prescribed by the LDA—whether it is really useful, to whom, and for what purposes is another question. Does the level of generality called for actually increase government accountability, which is the purpose of the LDA? Does it deter unlawful or otherwise inappropriate behavior, the other purpose of the LDA? Reasonable people are likely to differ in their responses to those questions. Not surprisingly, the information contained in the LD-1 and LD-2 databases maintained by the Secretary and Clerk has been mined since 1995 by various watchdog groups, like the Center for Public Integrity,⁷¹ the Center for Responsive Politics,⁷² and Public

69. Actually, the figures reported may be misleading. Ford utilized its option under section 15 of the LDA to use Internal Revenue Code definitions of lobbying activities rather than LDA definitions (Line 14). See 2 U.S.C.A. § 1610(b)(1) (West Supp. 2009). The IRC definitions include state level and grassroots lobbying which are not included under LDA definitions. In other words, the reported figures may be inflated so as to overstate the amount of federal level lobbying, and there is no way to tell from the form. On the other hand, they may understate the amount of federal lobbying since the IRC definition of executive branch lobbying is more restrictive (in terms of covered officials) than the LDA's definition. For an examination of the operation of section 15 and a proposal to repeal this option, see William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 50-52 (2006).

70. See S. REP. NO. 103-37, at 4-5 (1993).

71. The Center for Public Integrity, Lobby Watch: How Private Interests Influence Public Policy, <http://projects.publicintegrity.org/lobby/> (last visited Aug. 7, 2009) (on file with the *McGeorge Law Review*).

72. OpenSecrets.org, Lobbying Database, <http://www.opensecrets.org/lobbyists> (last visited Aug. 7, 2009) (on file with the *McGeorge Law Review*).

Citizen,⁷³ for whatever valuable insights it can offer. For example, the data can be collected and arrayed to show which agencies have been lobbied by which registrants; which organizations have spent the most to lobby; and which lobbying firms rake in the most income,⁷⁴ a statistic that is, by the way, a great advertisement for the firms at the top of the list. Despite the generality of the information made available, there have been instances where LDA reports have been used as leads to identify questionable conduct,⁷⁵ including, most famously, some aspects of the scandals surrounding Jack Abramoff.⁷⁶

One way to make the information provided on the LD-2 somewhat more meaningful and, therefore, better able to carry out the purposes of the LDA, would be to arrange it, not by general topic area, but rather by active lobbyist name. Unfortunately, that relatively small change would require a statutory amendment. Other than imparting somewhat greater clarity to the nature of specific lobbying campaigns, one of the advantages of this fine-tuning would be to increase the ability to determine whether a particular lobbyist continued to focus his or her efforts on the governmental entity where he or she had

73. LobbyingInfo.org, Search Database, <http://www.lobbyinginfo.org/search> (last visited Aug. 25, 2009) (on file with the *McGeorge Law Review*).

74. See, e.g., The Center for Public Integrity, *supra* note 71.

75. A story appearing in *USA Today* in February 2006 highlighted the ability of LDA filings to spotlight, or at least create a basis for further exploration of, possible abuse or inappropriate behavior. The article suggested that Senator Arlen Specter or his staff had arranged for millions of dollars of "earmarks" for Pennsylvania companies represented by a lobbying firm headed by the husband of one of the Senator's staff. See Matt Kelley, *Firm's Clients Benefiting from Contracts*, USA TODAY, Feb. 15, 2006, available at http://www.usatoday.com/news/washington/2006-02-15-specter-inside_x.htm. LDA reports filed by the lobbying firm that listed the husband as the lobbyist for particular projects were apparently crucial in attracting attention to Specter's office. See Maeve Reston, *Specter Denies Lobbying Charge*, PITT. POST-GAZETTE, Feb. 17, 2006, at A1, A9. The lobbyist denied contacting the Senator's office with regard to the earmarks at issue, and while the Senator did not believe that any law or ethics rule had been violated, the matter was referred to the Senate Ethics Committee for review. *Id.*

76. In its opening story on the Abramoff affair, *The Washington Post* reported:

A powerful Washington lobbyist and a former aide to House Majority Leader Tom DeLay (R-Tex.) persuaded four newly wealthy Indian gaming tribes to pay their firms more than \$45 million over the past three years for lobbying and public affairs work, a sum that rivals spending to influence public policy by some of the nation's biggest corporate interests.

Touting his ties to conservatives in Congress and the White House, lobbyist Jack Abramoff persuaded the tribes to hire him and public relations executive Michael Scanlon to block powerful forces both at home and in Washington who have designs on their money, according to tribe members.

Under Abramoff's guidance, the four tribes—Michigan's Saginaw Chippewas, the Agua Caliente of California, the Mississippi Choctaws and the Louisiana Coushattas—have also become major political donors. They have loosened their traditional ties to the Democratic Party, giving Republicans two-thirds of the \$2.9 million they have donated to federal candidates since 2001, records show.

The payday for the GOP is small though, compared with the \$15.1 million the tribes have paid Abramoff and his law firm, Greenberg Traurig, which has rocketed to the ranks of top lobbyists on the fees it has charged gaming tribes, lobbying records show.

Susan Schmidt, *A Jackpot from Indian Gaming Tribes*, WASH. POST, Feb. 22, 2004, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/03/06/AR2006030600702_pf.html (emphasis added).

previously worked as a covered legislative or executive branch official. The success of a particular campaign might be explainable, in part, because of such connections. More importantly, the timing of the lobbying contact with a former governmental employer might suggest a possible violation of the restrictions on post-employment lobbying that exist by virtue of statute, executive order, and congressional rule.⁷⁷ Indeed, the possibility of disclosure might deter such violations.

However, were Congress to revisit the nature of LD-2 disclosures, it should consider going beyond a modest rearrangement of the information contained in the quarterly report. Rather, the LD-2 should provide much more detailed information with regard to what specific government entities and officials were contacted, when, and with what arguments or information.⁷⁸ Among other things, this type of disclosure could more clearly indicate whether or not post-employment restrictions had been honored. It would also facilitate the ability of the members of the public opposed to the policy goals of the registrant's lobbying campaign to counter that campaign with their own submissions to contacted legislators and administrators. There is obviously a balance to be struck between providing more meaningful information, on the one hand, and imposing costs on registrants that could deter lobbying efforts, on the other. This is a balance that the First Amendment demands, but it is clear that Congress did not approach the outer limits on what it could require when it adopted the LDA in 1995 and amended it in 2007.⁷⁹

While HLOGA added new disclosure requirements for registration forms and quarterly reports (those related to "affiliated" organizations being among the most important),⁸⁰ the generality of and format for providing the required

77. See, e.g., Robert G. Vaughn, *Post-Employment Restrictions and the Regulation of Lobbying by Former Employees*, in THE LOBBYING MANUAL, *supra* note 17, at 525-54.

78. In fact, one of the lobbying bills introduced, but not enacted, in the 110th Congress required somewhat more detailed reporting with regard to lobbying communications to executive branch officials than the current LDA. See H.R. 984, 110th Cong. (2007) (imposing reporting burden on the official, not the lobbyist).

Each record made, and each report filed, under subsection (a) shall contain—(1) the name of the covered executive branch official; (2) the name of each private party who had a significant contact with that official; and 3) for each private party so named, a summary of the nature of the contact, including—(A) the date of the contact; (B) the subject matter of the contact and the specific executive branch action to which the contact relates; and (C) if the contact was made on behalf of a client, the name of the client.

Id. Interestingly, this is the type of information new Obama Administration memoranda require to be posted on the Internet with regard to oral communications by lobbyists regarding distribution of government funds under the 2009 economic stimulus and bank-bailout legislation. See *infra* text accompanying notes 188 and 191.

79. See, e.g., William V. Luneburg, *Anonymity and Its Dubious Relevance to the Constitutionality of Lobbying Disclosure Legislation*, 19 STAN. L. & POL'Y REV. 69 (2008).

80. See *supra* note 54; see also 2 U.S.C.A. § 1603(b)(6) (West Supp. 2009) (lengthening the look-back period for lobbyists' previous service as covered executive and legislative branch officials from two to twenty years); *id.* § 1604(b)(5) (requiring disclosure of "whether the client is a [s]tate or local government or a department, agency, special purpose district, or other instrumentality controlled by one or more [s]tate or local governments").

information did not change in any significant way.⁸¹ Rather, Congress focused particular attention on an important source of lobbyist influence previously undisclosed: money spent to cultivate the lobbyist's intended audience of congressional and executive branch officials. Specifically, HLOGA mandated: (1) a semiannual report of various types of contributions and disbursements made to or for the benefit of federal candidates and covered legislative and executive branch officials (what is known as the "LD-203" after section 203 of that statute) to be filed by active registrants and lobbyists listed on registrations and quarterly reports whose names have not been removed on the registration update form;⁸² and (2) a report (filed semiannually and sometimes more frequently) of lobbyist "bundling" of campaign contributions to be filed by political committees under the amended Federal Election Campaign Act of 1971 (FECA).⁸³ With regard to both the LD-203 and the new FECA bundling reports, the information provided is neither client- nor lobbying-campaign-specific, in recognition of the fact that the money contributed or collected by a lobbyist or LDA registrant may help, in terms of leverage and access, all of their clients with respect to all of their lobbying campaigns. Section 203 is discussed in this part of this Article since it is included in the LDA; bundling is left for a later section since it is a component of the FECA scheme of disclosure.

The LD-203 must, like other LDA reports, be filed electronically with the Secretary and Clerk⁸⁴ to insure a relatively up-to-date database that is publicly searchable, sortable, downloadable, and available on the Internet.⁸⁵ The filer, whether a registrant or lobbyist, must report the date, amount, and recipient of:

- 1) political contributions of \$200 or more to federal candidates, officeholders, certain political action committees, and political party committees;⁸⁶
- 2) contributions and disbursements of any amount "to pay the cost of an event to honor or recognize a covered legislative branch official or covered executive branch official"; "to an entity that is named for a

81. There was one change in format for providing information that does not make the information provided more meaningful; indeed, it may make it less so. Affiliated organizations, if they do not in major part control the lobbying activities of the registrant, can be listed on the client's internet site and not on the LD-1 as long as the LD-1 contains the address of the site. See 2 U.S.C.A. § 1603(b) (West Supp. 2009). However, the website listing, unlike the LD-1, need not indicate the level of contribution of the affiliated entity, which can be listed with all other contributors, large and small. *Id.* Listing of an entity on the LD-1 is required for contributions exceeding \$5,000 in a quarterly period, though the exact amount of contribution need not be specified. *Id.*

82. 2 U.S.C.A. § 1604(d) (West Supp. 2009).

83. *Id.* § 434(i) (discussed *infra* in text accompanying notes 153-71).

84. *Id.* § 1604(e).

85. *Id.* § 1605(a)(4), (9).

86. *Id.* § 1604(d)(1)(D). This does not include contributions "bundled" by the filer, which are covered by a different HLOGA provision described below. See *infra* text accompanying notes 153-71.

covered legislative branch official or to a person or entity in recognition of such official"; "to an entity established, financed, maintained, or controlled by a covered [legislative or executive branch] official, or an entity designated by such an official"; or "to pay the costs of a meeting, retreat, conference, or other similar event held by, or in the name of, [one] or more covered [legislative or executive branch] officials";⁸⁷ and

- 3) contributions of at least \$200 to a presidential library foundation or a presidential inaugural committee.⁸⁸

Contributions and disbursements count whether or not they are made by the registrant or lobbyist or, rather, by a political committee established or controlled by the registrant or lobbyist.⁸⁹

As we will see, the significance of the reportable contributions and disbursements is magnified by the fact that they are regulated by rules other than the LDA, including the FECA, congressional gift and travel rules, and statutes, executive orders, and regulations that apply to the executive branch. Indeed, without those other legal regimes, the coverage of these particular contributions and disbursements would make much less sense. Accordingly, at this point, we must turn our attention to those other restrictions that implicate federal lobbyists and lobbying.

B. The Relationship of the LDA to Other Rules Regulating Lobbying

How does the LDA relate to other regimes of regulation that pertain to the practice of federal lobbying? There are two principal ways. First, the LDA reinforces compliance with other laws related to lobbying. Second, the status as registrant or lobbyist under the LDA triggers coverage by other statutes, executive orders, and rules that impose restrictions or requirements.

1. Reinforcement of Other Lobbying Law

The first of these laws for which the LDA reinforces compliance is the Foreign Agents Registration Act (FARA).⁹⁰ That statute requires that an "agent of a foreign principal"⁹¹ register with the Department of Justice within ten days of

87. 2 U.S.C.A. § 1604(d)(1)(E)(i)-(iv) (West Supp. 2009).

88. *Id.* § 1604(d)(1)(F).

89. *Id.* § 1604(d)(1). Contributions in the second category listed above need not be reported if they are reportable to the Federal Election Commission. *Id.* § 1604(d)(1)(E).

90. Foreign Agents Registration Act, Pub. L. No. 110-81, § 212, 121 Stat. 735, 749 (2007) (codified as amended at 22 U.S.C. §§ 611-621).

91. 22 U.S.C. § 611(c) (2006) (defining "agent of a foreign principal").

agreeing to become an agent⁹² and before performing any “political activity” seeking to influence Congress, federal agencies, or public opinion in the United States “with reference to [inter alia] formulating, adopting, or changing the domestic or foreign policies of the United States.”⁹³ Foreign principals include foreign governments, foreign political parties, and foreign commercial entities.⁹⁴ FARA registration is a substantial undertaking in light of the detailed information that must be disclosed and updated every six months with regard to the agent, the principal, and the political and other activities undertaken on the principal’s behalf.⁹⁵ However, persons representing foreign principals other than foreign governments and foreign political parties can opt to register under the LDA instead of the FARA even where they do not meet LDA thresholds for required registration.⁹⁶ By doing so, they escape the detailed disclosure regime of the FARA. The choice to register under the LDA was, therefore, an easy one in most cases until HLOGA increased the disclosure and other requirements applicable to LDA registrants and listed lobbyists, including the bundling provisions added to the Federal Election Campaign Act of 1971, and the Obama Administration imposed additional requirements on LDA-registered lobbyists.⁹⁷

Consider, in this context, the case where a person or entity qualifies for registration under the FARA as an agent of a foreign commercial entity, but is not registered under that statute, nor is that person or entity registered under the LDA. All of a sudden, there may be both a criminal prosecution under the FARA⁹⁸ and civil and criminal actions under the LDA⁹⁹ for the failure to register under one of these statutes.¹⁰⁰ The possibility of several prosecutions under different statutes magnifies the incentives to comply with applicable disclosure law. For purposes of comparison, the criminal penalty for a FARA violation ranges up to \$10,000 and five years imprisonment.¹⁰¹ After the amendments to the LDA made by HLOGA, the civil penalty for violation of the LDA tops off at \$200,000, with a criminal penalty of five years imprisonment plus a fine under

92. *Id.* § 612(a).

93. *Id.* § 611(o) (defining “political activities”).

94. *Id.* § 611(b) (defining “foreign principal”).

95. *Id.* § 612(a)(1)-(11).

96. 22 U.S.C. § 613(h) (2006). It is not entirely clear whether, if LDA thresholds are met for these entities, they *must* register under the LDA rather than under FARA; the choice described in the text may not exist for such entities.

97. *See infra* text accompanying notes 172-94.

98. 22 U.S.C. § 618(a).

99. 2 U.S.C.A. § 1606(a)(2), (b) (West Supp. 2009).

100. The exception from FARA registration applies only where LDA registration has in fact occurred. *See* 22 U.S.C. § 613(h) (2006) (exempting from the registration requirements “[a]ny agent of a person described in section 611(b)(2) of this title or an entity described in section 611(b)(3) of this title if the agent has engaged in lobbying activities and has registered under the Lobbying Disclosure Act of 1995 [2 U.S.C.A. 1601 et seq.] in connection with the agent’s representation of such person or entity.” (emphasis added)).

101. 22 U.S.C. § 618(a).

Title 18.¹⁰² While, prior to 2007, prosecution under FARA was more likely feared than a prosecution under the LDA,¹⁰³ it is far from clear whether that should still be the case. Of course, that depends in part on the aggressiveness of prosecutors—something that has, to this point, been lacking when it comes to LDA enforcement, as will be discussed below.¹⁰⁴

Then there is the case of congressional gift and travel rules.¹⁰⁵ Suffice it to say that those detailed (some might say arcane) rules apply by their terms to members of Congress, staff, and congressional employees, not to outsiders.¹⁰⁶ Since 2007, no gift of any amount can be accepted from LDA registrants, listed lobbyists, or their clients unless it falls into one of the numerous specific exceptions provided in the rules.¹⁰⁷ Prior to that time, only recipients of gifts could be disciplined by the respective House of Congress.¹⁰⁸ But the gift-givers could neither be punished by Congress nor were they liable for criminal or civil penalties unless the payment constituted a difficult-to-prove bribe or illegal gratuity,¹⁰⁹ in which case the recipient member or staff could also be prosecuted.¹¹⁰

This situation has changed dramatically with the enactment of HLOGA. First of all, a comparison of the categories of LD-203 reportable contributions and disbursements to covered legislative branch officials with the congressional gift rules indicates that reportable items may, in many instances, run afoul of those

102. 2 U.S.C.A. § 1606(a)-(b) (West Supp. 2009).

103. Nevertheless, criminal prosecutions under FARA in recent years have not been numerous:

Th[e] increase in the Government's burden of proof [in 1966], along with the addition of a civil injunctive remedy similar to that in the securities laws (See Section 8(f) of the Act), and the "Rule 2" advisory opinion mechanism, wherein the Department provides statements of its enforcement intentions regarding proposed activities which may require registration under the Act (See 28 C.F.R. § 5.2), drastically reduced the incidence of criminal FARA prosecutions and increased civil and administrative resolution of FARA questions. Since 1966 there have been no successful criminal prosecutions under FARA and only 3 indictments returned or informations filed charging FARA violations.

U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, FOREIGN AGENTS REGISTRATION ACT ENFORCEMENT (revised 1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02062.htm (on file with the *McGeorge Law Review*).

104. See *infra* text accompanying notes 220-39.

105. S. RULE XXXV, available at <http://rules.senate.gov/public/index.cfm?FuseAction=HowCongressWorks.RulesOfSenate> (last visited Aug. 7, 2009) (on file with the *McGeorge Law Review*); H.R. RULE XXV, available at <http://www.rules.house.gov/ruleprec/111th.pdf> (last visited Aug. 7, 2009) (on file with the *McGeorge Law Review*).

106. See S. RULE XXXV(1)(a)(1); H.R. RULE XXV(5)(a)(1).

107. See S. RULE XXXV(1)(a)(2)(B); H.R. RULE XXV(5)(a)(1)(A)(ii).

108. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

109. See 18 U.S.C. § 201(b)-(c) (2006) (defining the possible bribery offenses and their penalties).

110. *Id.* § 201(b)(2), (c)(1)(B). For a discussion of the distinctive nature of these offenses and the difficulties encountered in prosecuting violations, see James B. Christian, Jr. & John Hilton, *Criminal Prosecution of Lobbyists for Bribery and Offering Gratuities to Legislators*, in THE LOBBYING MANUAL, *supra* note 17, at 555-70, and Stanley M. Brand, *Federal Lobbying and the Criminal Law: New Arrows in the Prosecutor's Anti-Corruption Quiver*, in THE LOBBYING MANUAL, *supra* note 17, at 571-79.

rules.¹¹¹ For example, if Lobbyist A provides the funds to buy a large-screen, high definition television to be presented to Senator B at an event held in his honor, there is no exception from the gift rules to permit receipt of that item despite the fact that it falls within the second category of reportable disbursements under section 203.¹¹² Moreover, some reportable contributions and disbursements for meetings, retreats, conferences, and similar events¹¹³ may be off-limits under both the Senate and House rules if a lobbyist (as opposed to a registrant) provides the money.¹¹⁴

Second, the LD-203 requires a certification that the filer-lobbyist or registrant has read and is familiar with the gift rules and “has not provided, requested, or directed a gift, including travel, to a Member of Congress or an officer or employee of either House of Congress with knowledge that the receipt of the gift would violate” the rules.¹¹⁵ Not only is a false certification punishable under the LDA by civil and criminal penalties,¹¹⁶ but it is also criminally punishable under the False Statements Accountability Act of 1996 (FSAA).¹¹⁷ Indeed, the LD-203 report of a prohibited contribution or disbursement to a covered legislative branch official would, no doubt, be used as evidence in the prosecution to establish that the gift in fact occurred and thereby establish one of the elements necessary to show a false certification.

But, after HLOGA, there is more disturbing news for the gift-giver. The LDA, as amended in 2007, now imposes both civil and criminal penalties on registrants and listed lobbyists who “make a gift or provide travel to a covered legislative branch official if the person has knowledge that the gift or travel may not be accepted by that covered legislative branch official under the Rules of the House of Representatives or the Standing Rules of the Senate (as the case may

111. The four categories of expenditures reportable to or on behalf of legislative branch officials encompass only a few of the situations involving gifts that fall within the coverage of congressional rules. That is to say, the LDA might have been amended to require, but does not in fact now require, an accounting for all gifts to covered legislative branch officials made by LDA registrants and lobbyists.

112. 2 U.S.C.A. § 1604(d)(1)(E)(i) (West Supp. 2009), described *supra* in text accompanying note 87.

113. *Id.* § 1604(d)(1)(E)(iv).

114. See S. RULE XXXV(3)(d): prohibited gifts include “[a] financial contribution or expenditure made by a registered lobbyist or an agent of a foreign principal relating to a conference, retreat, or similar event, sponsored by or affiliated with an official congressional organization, for or on behalf of Members, officers, or employees.” See also H.R. RULE XXV(5)(e)(4): prohibited gifts include any “financial contribution or expenditure made by a registered lobbyist or an agent of a foreign principal relating to a conference, retreat, or similar event, sponsored by or affiliated with an official congressional organization, for or on behalf of Members, Delegates, the Resident Commissioner, officers, or employees of the House.” To be reportable under section 203, however, the event must, in addition, be “held by, or in the name of, [one] or more covered legislative branch officials or executive branch officials.” 2 U.S.C.A. § 1604(d)(1)(E)(iv) (West Supp. 2009).

115. 2 U.S.C.A. § 1604(d)(1)(G) (West Supp. 2009).

116. A false certification would constitute a “defective filing” and would be subject to punishment. *Id.* § 1606(a)-(b). See William V. Luneburg, *Administration and Enforcement of the LDA and Miscellaneous Lobbying Restrictions*, in THE LOBBYING MANUAL, *supra* note 17, at 186, 189.

117. 18 U.S.C. § 1001(a), (c)(1) (2006).

be).”¹¹⁸ In other words, congressional gift rules now legally bind persons within and without the legislative branch, both the givers and the receivers. The LD-203 report of a prohibited contribution or disbursement¹¹⁹ can be used as evidence in prosecutions under the LDA for violations of congressional gift rules.¹²⁰ If a lobbyist or registrant has filed an LD-203, but has not reported the illegal gift as required, the lobbyist or registrant can be prosecuted under the LDA for not only the failure to report (a “defective filing”), but also for false certification and the unlawful gift.

The principal difficulty faced by prosecutors seeking civil or criminal penalties under the LDA or the FSAA for false certification, or under the LDA for unlawful gifting, is presented by the required scienter elements of the offenses.¹²¹ Given the detailed and sometimes complex nature of the congressional rules, the scienter requirements could be difficult to satisfy but for one important provision of HLOGA. The compliance certification contained in the LD-203, as required by that statute, asserts that the filer “has read and is familiar with” the congressional gift rules.¹²² Arguably, that certification should create a presumption, perhaps irrebuttable, that will go a long way towards establishing the necessary scienter.¹²³

118. 2 U.S.C.A. § 1613 (West Supp. 2009). A violation of the no-gift prohibition would be punishable under the general sanctioning provision of the LDA. *Id.* § 1606.

119. Since reportable contributions and disbursements do not encompass the full scope of gifts prohibited by congressional rules, the LD-203 will not be helpful in proving some gift rule violations. *See generally* S. RULE XXXV; H.R. RULE XXV.

120. This raises the question of self-incrimination. When a court is confronted with a disclosure requirement that has incriminating potential, it will conduct a balancing of the public’s need for disclosure, on the one hand, against the protection of the right against self-incrimination established by the Fifth Amendment on the other. *See California v. Byers*, 402 U.S. 424, 427 (1971). The mere possibility of self-incrimination, however, is insufficient to outweigh the policies in favor of disclosure. *Id.* at 428. To show that the disclosure presents a “real and appreciable” hazard of self-incrimination, the claimant must demonstrate that it is (1) “directed at a highly selective group inherently suspect of criminal activities,” not the “public at large”; and (2) that the privilege is “not asserted in an essentially noncriminal and regulatory area of inquiry” but rather “an area permeated with criminal statutes.” *See Grosso v. United States*, 390 U.S. 62, 67 (1968); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965) (holding that a Communist group could claim Fifth Amendment protection where an order required it to provide a list of its members to the Attorney General).

The LDA is aimed at lobbyists, a group not inherently suspect of criminal activities (though it certainly receives bad press for its perceived deleterious impact on the governmental system). Indeed, the Act as a whole is essentially regulatory rather than criminal. Further, the Act governs lobbying, which is not an area permeated with criminal statutes. In short, while “disclosure of inherently illegal activity is inherently risky,” *Byers*, 402 U.S. at 431, a court will likely find no substantial risk of self-incrimination posed by section 203 reporting.

121. There are essentially “layered” scienter requirements in the LDA, with “knowledge” as an element of the certification requirement itself, the substantive prohibition on impermissible gifts, and the definition of the offense. *See* 2 U.S.C.A. §§ 1604(d)(1)(G), 1606, 1613 (West Supp. 2009).

122. *Id.* § 1604(d)(1)(G)(i).

123. At a minimum, this part of the certification should satisfy the scienter requirements contained in both the compliance certification itself and the no-gift prohibition. There might be cases where the filer claims that he or she read the rules, but only after the unlawful gift was made so that the required scienter was not present at the time of the gift. Such an apparently carefree approach by a registrant or lobbyist might not be credible to a jury.

Turning from Congress, officials and employees of the executive branch are also subject to statutes,¹²⁴ a new executive order,¹²⁵ and detailed regulations¹²⁶ that limit their ability to receive gifts, including travel, from persons outside the government. Violation of those restrictions can be punished in a variety of ways, including adverse employment action taken against the officers and employees involved in the prohibited transactions.¹²⁷ The restrictions apply by their terms only to government officials. Depending on the circumstances, LD-203 reportable contributions and disbursements to or on behalf of covered executive branch officials could include those that violate executive branch gift rules. For instance, a contribution given by a lobbyist to an entity that is designated by a covered executive branch official is covered by section 203.¹²⁸ But gifts prohibited to executive branch employees include gifts given to third parties on the recommendation of the employee.¹²⁹ If, therefore, a lobbyist seeking action from the employee's agency¹³⁰ gives new computers to a local school identified by the employee,¹³¹ the computers would constitute prohibited gifts¹³² and, if that employee were a "covered executive branch official" within the meaning of the LDA (e.g., a Schedule C employee), the gift would have to be reported on the LD-203 filed by the lobbyist.

However, the HLOGA certification requirement and ban on gifts extends no further than the congressional rules. This is an unfortunate and anomalous gap in the LDA that should be remedied by Congress at the first opportunity. There is no rational basis to distinguish congressional and executive branch gift rules in terms of the need for providing adequate incentives for compliance for both the gift recipient and the gift-giver. As the situation stands today, however, if a lobbyist or LDA registrant does not, in whole or in part, report on their filed LD-203 covered contributions and disbursements to or for covered executive branch officials that have been made during the filing period (whether or not those are permitted under executive branch rules), the filer may be faced with a civil or criminal proceeding under the LDA for a "defective filing,"¹³³ assuming the

124. See, e.g., 5 U.S.C. § 7353 (2006).

125. Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009), discussed *infra* in text accompanying notes 172-81.

126. See, e.g., 5 C.F.R. § 2635 (2009).

127. See, e.g., *id.* § 2635.106.

128. 2 U.S.C.A. § 1604(d)(1)(E)(iii) (West Supp. 2009).

129. 5 C.F.R. § 2635.203(f)(2) (2009).

130. 5 U.S.C. § 7353(a)(1)-(2) (2006).

131. 5 C.F.R. § 2635.203(f)(2) (2009) (stating in Example 1 of this sub-section that "[a]n employee who must decline a gift of a personal computer pursuant to this subpart may not suggest that the gift be given instead to one of five charitable organizations whose names are provided by the employee").

132. This assumes that none of the exceptions to the gift ban (for example, gift from a family member) are applicable. See Kathleen Clark & Beth Nolan, *Restrictions on Gifts and Outside Compensation for Executive Branch Employees*, in THE LOBBYING MANUAL, *supra* note 17, at 517-19.

133. See William V. Luneburg, *Administration and Enforcement of the LDA and Miscellaneous Lobbying Restrictions*, in THE LOBBYING MANUAL, *supra* note 17, at 186.

applicable scienter requirements are satisfied.¹³⁴ There could also be a criminal proceeding under the FSAA for a false report.¹³⁵ If those contributions and disbursements are fully and accurately reported, even if they violate federal law, that is the end of the matter in terms of possible criminal and civil prosecutions against the gift-giver, unless it can be established that the payment constituted a bribe, illegal gratuity, unlawful salary supplementation,¹³⁶ or some other criminal offense,¹³⁷ in which event the LD-203 could be used in evidence against the filer to establish that the prohibited payment was in fact made.

The political contributions that must be reported on the LD-203 include not only those that comply with FECA limits, but also those that exceed the amounts permitted under federal election law.¹³⁸ Indeed, a registrant that is a corporation or labor union is prohibited (so far¹³⁹) by federal law from using treasury funds to contribute to a federal election campaign.¹⁴⁰ But such contributions, if they occur, must be reported under section 203 by a registrant corporation or union. Accordingly, LD-203 reports of unlawful campaign contributions by individuals or entities can be used in prosecutions under the FECA.¹⁴¹ Moreover, the knowing failure to report a FECA contribution on the LD-203 (assuming it is filed), whether or not in excess of federal limits, would be prosecutable as a “defective filing.”¹⁴² Prosecution under the FSAA would also be available in those circumstances. In that respect, section 203 reinforces the disclosure requirements of the FECA as they apply to political contributions,¹⁴³ since enforcement actions under both the LDA and the FECA could be brought for the failure to report a particular contribution.

Indeed, HLOGA mandates that the Secretary and Clerk maintain publicly accessible Internet databases of the LDA-required reports with “electronic links

134. 2 U.S.C.A. § 1606(a), (b) (West Supp. 2009).

135. 18 U.S.C. § 1001 (2006).

136. *Id.* § 209(a).

137. See Kathleen Clark & Beth Nolan, *Restrictions on Gifts and Outside Compensation for Executive Branch Employees*, in THE LOBBYING MANUAL, *supra* note 17, at 513-15.

138. For example, an individual lobbyist is limited to a contribution of \$2,400 for a federal candidate’s primary election and an additional \$2,400 for his or her general election. 2 U.S.C. §§ 441a(a)(1)(A), 441a(c) (2006); 11 C.F.R. §§ 110.1(b), 110.17(b) (2009).

139. But see, e.g., Mark Sherman, *Court Signals It May Loosen Campaign Spending*, HUFFINGTON POST, Sept. 9, 2009, available at http://www.huffingtonpost.com/2009/09/09/hillary-the-movie-gets-ne_n_280328.html?view=screen (discussing the oral arguments in *Citizens United v. FEC*, No. 08-205, which was argued on Sept. 9, 2009, where it appeared that there might be five votes to undo long-established limits on corporate campaign spending).

140. See 2 U.S.C. § 441b (2006). For a detailed overview of federal campaign-finance law, see Trevor Potter & Matthew T. Sanderson, *Federal Campaign-Finance Law: A Primer for the Lobbyist*, in THE LOBBYING MANUAL, *supra* note 17, at 429-69.

141. See, e.g., 2 U.S.C. § 437g(d) (2006) (providing the criminal penalties).

142. See William V. Luneburg, *Administration and Enforcement of the LDA and Miscellaneous Lobbying Restrictions*, in THE LOBBYING MANUAL, *supra* note 17, at 186. Failure to file an LD-203 in toto where required could be prosecuted, though not as a defective filing. *Id.*

143. 2 U.S.C. § 434(b)(3) (2006) (reporting by political committees).

or other appropriate mechanisms to allow users to obtain relevant information in the database of the Federal Election Commission.”¹⁴⁴ If those linkages are optimally designed,¹⁴⁵ the failure to report FECA-covered contributions under the LDA or, alternatively, under the FECA will be more easily discoverable. Similarly, the making of an illegal political contribution may be more likely to be identified where, for example, the LD-203 reports the contribution, but it is not reported to the Federal Election Commission. In other words, the database linkages should, if thoughtfully created, help insure a consistency of reporting and, if inconsistency arises, those inconsistencies should prompt enforcement authorities to investigate.

2. *Definitional Linkages*

There are a variety of statutes and rules that rely on the LDA to trigger other obligations that relate to lobbying. Several of the most important definitional linkages are noted below, some of which have only recently been created by the Obama Administration in its attempt to dispel the actuality and appearance of undue lobbyist influence.

a. *Congressional Gift and Post-Employment Restrictions*

First of all, as indicated previously, the House and Senate gift rules now prohibit gifts, with various exceptions, “from a registered lobbyist . . . or [from] a private entity that retains or employs a registered lobbyist.”¹⁴⁶ “Registered lobbyist” is, in turn, defined to include “a lobbyist registered under the Federal Regulation of Lobbying Act or any successor statute, [for example, the LDA].”¹⁴⁷ Lobbyists themselves were required to register under the FRLA. But under the LDA individual lobbyists do not register (unless self-employed), their employers do.¹⁴⁸ Clearly, however, the House and Senate intend to include both LDA registrants and lobbyists listed on registrations and quarterly reports, as well as their clients, within the scope of the gift ban. Moreover, the same or similar language referring to “registered lobbyists” is found, for example, in the Senate’s

144. 2 U.S.C.A. § 1605(a)(9)(C) (West Supp. 2009).

145. As of this writing, the Secretary of the Senate merely provides a link to the FEC’s website. See United State Senate, Public Disclosure, http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm (last visited Sept. 9, 2009) (on file with the *McGeorge Law Review*). There is no such link on the Clerk’s website. It is possible (though not entirely clear) that the Senate’s manner of linkage complies with the LDA. It would be better still, however, if searches of the LDA section 203 database under the names of lobbyists and registrants not only produced FECA information provided in LD-203 forms, but also corresponding political contribution information filed with the FEC under the FECA for the same entities.

146. S. RULE XXXV(1)(a)(2)(B); H.R. RULE XXV(5)(a)(1)(A)(ii).

147. S. RULE XXXV(5)(a); H.R. RULE XXV(5)(g)(1).

148. See *supra* text accompanying note 42.

rules restricting post-employment congressional lobbying by former congressional staff.¹⁴⁹

b. Lobbying with Appropriated Funds

The Byrd Amendment prohibits the use of appropriated moneys to lobby Congress or executive branch officials for a “[f]ederal contract, grant, loan, or cooperative agreement” or an “extension, continuation, renewal, amendment or modification” thereof.¹⁵⁰ Persons who request or receive those forms of federal support must file a written declaration containing “the name of any registrant under the Lobbying Disclosure Act . . . who has made lobbying contacts . . . with respect to the [f]ederal contract, grant, loan, or cooperative agreement” and a certification that no appropriated funds were used in contravention of the statutory prohibition.¹⁵¹

c. Lobbyist Bundling of Campaign Contributions

As amended by section 204 of HLOGA, section 434 of the Federal Election Campaign Act now deals with lobbyist “bundling” of campaign contributions.¹⁵² Chris Van Hollen (D-MD), the principal House sponsor and author of the proposal for bundling disclosure, explained the provision to the House of Representatives as follows:

This bill also contains a provision that creates greater transparency at the intersection of campaign contributions and public policy. While existing campaign finance laws place limits on campaign contribution amounts, individuals that want to exceed the limits may do so by pulling together the contributions of third parties. This practice is known as “bundling.” In and of itself, there is nothing wrong with this practice of aggregating the contributions of others. However, when the bundling of contributions is done by someone who lobbies on behalf of a particular

149. S. RULE XXXVII(9):

If an employee on the staff of a Member, upon leaving that position, becomes a registered lobbyist under the Federal Regulation of Lobbying Act of 1946 or any successor statute, or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, such employee may not lobby the Member for whom he worked or that Member's staff for a period of one year after leaving that position.

Id. at (9)(a); *see also id.* at (11) (prohibiting lobbying contacts between staff and a spouse or relative of Member who is a registered lobbyist).

150. The Byrd Amendment, Pub. L. No. 101-121, § 319, 103 Stat. 701, 750 (1989) (codified as amended at 31 U.S.C. § 1352 (2006)).

151. 31 U.S.C. § 1352(b)(1), (2) (2006); *see also id.* § 1352(b)(1), (3) (same with regard to agency commitments for the United States to insure or guarantee a loan). *See generally* Thomas M. Susman, *The Byrd Amendment*, in *THE LOBBYING MANUAL*, *supra* note 17, at 349-64.

152. 2 U.S.C. § 434 (2006), *amended by* HLOGA, Pub. L. No. 110-81, § 204, 121 Stat. 735, 744 (2007).

interest, this practice enables the lobbyist to enhance his or her stature with an official. This enhancement increases their opportunity to advance the cause of a special interest.

In order to guard against the use of this practice to exert an undue influence over public policy, I believe that we need to inject transparency into this process.¹⁵³

As originally drafted, the proposal would have required disclosure of bundling in reports filed with the Secretary of the Senate and Clerk of the House of Representatives as in the case of section 203 contributions and disbursements by lobbyists to or for the benefit of federal candidates and others.¹⁵⁴ Compromise with the Senate resulted in vesting of responsibility for insuring full disclosure in the Federal Election Commission (FEC), which already had in place various regulations dealing with disclosure of bundling, though those were not specifically directed at lobbyists.

Under the Federal Election Campaign Act of 1971, as implemented by FEC regulations prior to 2007 (and which remain in force today), “all contributions by a person made on behalf of or to a candidate, including contributions which are in any way earmarked *or otherwise directed to the candidate through an intermediary or conduit*, are contributions from the person to the candidate.”¹⁵⁵ “Earmarked” is defined to include “a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate’s authorized committee.”¹⁵⁶ “Conduit or intermediary” includes “any person *who receives and forwards* an earmarked contribution to a candidate or a candidate’s authorized committee,” with various exceptions.¹⁵⁷ Both the conduit or intermediary and the recipient candidate or committee must file various reports of these contributions.¹⁵⁸ Prior to HLOGA, however, if the contributor sent the contribution directly to the candidate or committee, disclosure of the bundling was not triggered, even if the recipient knew the identity of the intermediary or conduit who solicited the contribution and knew of her role in obtaining the contribution for the recipient.¹⁵⁹

153. 153 CONG. REC. H9209 (daily ed. July 31, 2007) (statement of Representative Van Hollen).

154. See H.R. 2317, 110th Cong. (2007).

155. 2 U.S.C. § 441a(a)(8) (2006); 11 C.F.R. § 110.6(a) (2009) (emphasis added).

156. 11 C.F.R. § 110.6(b)(1) (2009).

157. *Id.* § 110.6(b)(2) (emphasis added).

158. *Id.* § 110.6(c)(1), (2).

159. To be a “conduit or intermediary” within the meaning of FEC bundling rules as they existed before HLOGA (and as they stand today) required “receipt” by the conduit or intermediary of an earmarked contribution. See 11 C.F.R. § 110.6(b)(2) (2009).

That loophole did not go without notice:

In the 2000 presidential election cycle, the campaign of George W. Bush developed a new style of bundling activity that sidestepped FEC reporting requirements. Bundlers—then called “Pioneers” by the Bush campaign—signed a written pledge to raise at least \$100,000 in bundled contributions from many different individuals. On this pledge form, each fundraising bundler was assigned a tracking number. These bundlers would in turn ask employees, associates, friends or business colleagues to make a contribution, write the tracking number on their checks, and give the checks to the campaign on their own. This way, the bundler would get credit with [the] Bush [campaign] for the contribution, yet avoid any need to disclose to the public that the contribution was in fact solicited through a conduit bundler.¹⁶⁰

Section 204 of HLOGA was intended to close this loophole to require disclosure even if the lobbyist does not physically handle the bundled contribution.¹⁶¹ However, unlike the pre-existing FEC regulations, reporting obligations are imposed only on the recipient committee, not on the bundler.

The persons whose bundling is subject to section 204 disclosure, or “covered persons,” include those who, at the time the contribution is forwarded to or received by the committee, are either—

- 1) “current registrant[s]” under the LDA;
- 2) “individual[s] who are listed on a current registration . . . or a current report [filed under the LDA]”; or
- 3) “a political committee established or controlled by such a registrant or individual.”¹⁶²

The disclosure obligation is imposed on each authorized committee of a candidate, leadership PAC,¹⁶³ and political party committee.¹⁶⁴ The required report

160. Letter from Laura MacCleery & Craig Holman, Public Citizen, to Amy L. Rothstein, Assistant Gen. Counsel, FEC, et al., (Nov. 30, 2007), *available at* http://www.fec.gov/pdf/nprm/bundling_hloga/comm06.pdf (on file with the *McGeorge Law Review*) (comment on FEC Notice of Proposed Rulemaking 2007-23 regarding lobbyist bundling).

161. HLOGA, Pub. L. No. 110-81, § 204, 121 Stat. 735, 744 (2007) (amending 2 U.S.C. § 434 to add a new subsection (i)).

162. 2 U.S.C.A. § 434(i)(7) (West Supp. 2009).

163. A “leadership PAC,” which stands for “leadership political action committee,” is defined to mean “with respect to a candidate for election to Federal office or an individual holding Federal office, a political committee that is directly or indirectly established, financed, maintained or controlled by the candidate or the individual but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that such term does not include a political committee of a political party.” 2 U.S.C.A. § 434(i)(8)(B) (West Supp. 2009).

164. *Id.* § 434(i)(1), (6).

must be filed semi-annually (in some cases more frequently according to the recipient committee's FEC reporting calendar)¹⁶⁵ and must include "the name, address, and employer of each person reasonably known by the committee" to be a covered person "who provided two or more 'bundled contributions'" during a "covered period" to the committee that, when aggregated, exceed \$16,000.¹⁶⁶ The report must also include the aggregated amount of the bundled contributions provided during the "covered period."¹⁶⁷ A "bundled contribution" for the purpose of section 204 is one that is either "forwarded from the contributor or contributors to the committee by the [covered] person" (the previously reportable form of bundling) or "received by the committee from a contributor or contributors, but credited by the committee or candidate involved . . . to the [covered] person through records, designations, or other means of recognizing that a certain amount of money has been raised by the [covered] person."¹⁶⁸ The second alternative is the real innovation of section 204.

All the information disclosed under the new lobbyist bundling provision must be made publicly available on the FEC's website "in a manner that is searchable, sortable, and downloadable."¹⁶⁹ That database must, "to the greatest extent practicable," be "linked electronically" to those maintained by the Secretary of the Senate and Clerk of the House under the LDA.¹⁷⁰ That linkage, if optimally designed, will allow interested members of the public to get a better sense of the financial "clout" of a lobbyist and registrant to the extent both their individual contributions and disbursements reportable under section 203 and their "bundling" work covered by section 204 are viewable together.¹⁷¹

165. *Id.* § 435(i)(1), (2), (5)(A).

166. *Id.* § 434(i)(1), (3)(A). The original statutory threshold amount was \$15,000; it was adjusted by the FEC for inflation to \$16,000 for 2009. The amount is to be adjusted annually based on the Consumer Price Index. *Id.* § 434(i)(3)(B); Federal Election Commission, FAQ on Lobbyist Bundling, <http://www.fec.gov/law/lobbybundlingfaq.shtml#q3> (last visited Aug. 13, 2009) (on file with the *McGeorge Law Review*).

167. 2 U.S.C.A. § 434(i)(1)-(2) (West Supp. 2009).

168. *Id.* § 434(i)(8)(A).

169. *Id.* § 434(i)(4)(A).

170. *Id.* § 434(i)(4)(B).

171. The long-awaited FEC implementing regulations for section 204 were published as final rules on February 17, 2009, almost a year late. *See* 74 Fed. Reg. 7285 (Feb. 17, 2009). However, at the date of this writing, it appears that the FEC has not in fact created the required electronic linkages to the LDA databases.

Lobbyist assistance in political fundraising is a matter of intense interest today. *See, e.g., KAISER, supra* note 20. A simple hypothetical illustrates the interaction of the LDA, congressional gift rules, and federal election finance law. This hypothetical is based on the law as it exists at the time of this writing; by the time publication occurs, however, the Supreme Court may have significantly changed existing First Amendment case law authorizing limits on corporate political contributions. *See Sherman, supra* note 139. But, even if that change occurs, the basic pattern of disclosure obligations described below will remain the same.

Assume Firm A, a corporation, is an LDA registrant that lobbies on its own behalf. Lobbyists B and C are several of A's employees and are listed on A's LD-1s and LD-2s as its active lobbyist-employees. D is a Senator.

As a corporation, Firm A cannot pay the costs for a political fundraiser to be held for D, though the costs can be paid, for example, by Lobbyist B or Firm A's political action committee (PAC). Such costs could include a rental fee paid to Firm A in advance of the fundraiser for a large room in A's office building. Those

d. *Executive Order—Ethics Commitments by Executive Branch Personnel*

As one of his first official acts, President Obama signed an executive order creating a requirement that every individual appointed to a high executive branch non-career position, as well as Schedule C appointees (those who occupy confidential or policymaking positions in the executive branch), take a pledge that becomes part of his or her employment contract with regard to the individual's receipt of gifts from lobbyists, participation in governmental decisions in areas where the individual lobbied previously, and his or her employment as a lobbyist upon leaving the Administration.¹⁷²

Many of the applicable restrictions turn on the order's definition of "registered lobbyist [and] lobbying organization" as including "a lobbyist or an organization filing a registration pursuant to section 1603(a) of title 2, United States Code [the LDA], and in the case of an organization filing such a registration, 'registered lobbyist' shall include each of the lobbyists identified therein."¹⁷³ "Lobbyist" is defined as in the LDA;¹⁷⁴ "'lobby' and 'lobbied' shall mean to act or to have acted as a registered lobbyist."¹⁷⁵ Apparently due to careless draftsmanship, this definitional scheme does not expressly cover lobbyists who assume that status subsequent to the filing of the initial registration

outlays would count against the FECA limits on individual and PAC contributions. Lobbyist B and Firm A would report those contributions on their LD-203s if they meet the \$200 reporting threshold. If Lobbyist B served on a board of a PAC unconnected with Firm A and, at B's request, that PAC underwrote some of the costs of the event, Lobbyist B's LD-203 would have to report those payments if they amounted to \$200 or more. While these contributions would be considered "gifts" within the meaning of the House and Senate rules, they are excepted by the FECA contribution exception to those rules. Therefore, with regard to those outlays, a no-impermissible-gift-certification on the filed LD-203 forms would be accurate. If the money raised at the fundraiser was physically delivered by Lobbyist B to Senator D's committee, both the committee and Lobbyist B would have to file bundling reports under both the old and new FEC bundling rules. However, assuming neither Lobbyist B nor Lobbyist C physically delivered the money raised at the fundraiser to Senator D, but it was sent by the contributor-attendees directly to Senator D's political committee, the money raised may—or may not—be reported by the political committee as bundled by those lobbyists under the new bundling regime. Whether or not reporting would be required would depend on what "credit" the committee gives to B and C for the fundraising. For example, the committee might "credit" Firm A (even if it is a prohibited source) or Firm A's PAC or B or C's PAC, or B or C individually. It may also credit all equally or proportionally. None of that bundling need be reported on the LD-203s of either the lobbyists or Firm A.

172. Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009). The basic restrictions contained in this order have been elaborated upon and will continue to be further refined in regulations and advisory memoranda issued by the Office of Government Ethics and other executive branch agencies. *Id.* § 4(a), (c). *See, e.g.*, Memorandum from Robert I. Cusick, Dir., OGE, to Designated Agency Ethics Officials, Lobbyist Gift Ban Guidance DO-09-007 (Feb. 11, 2009), available at http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2009/do09007.pdf (on file with the *McGeorge Law Review*) (noting, among other things, that the gift ban applies to non-lobbyist employees of LDA registrants). The order may be enforced in a variety of ways, including termination of employment, disbarment proceedings, and civil proceedings in the federal courts for declaratory, injunctive and monetary relief. Exec. Order No. 13,490, § 5, 74 Fed. Reg. 4673 (Jan. 21, 2009).

173. Exec. Order No. 13,490, § 2(e), 74 Fed. Reg. 4673 (Jan. 21, 2009).

174. *Id.* § 2(d) (also incorporating the LDA's definition of "covered executive branch official").

175. *Id.* § 2(f).

statement (LD-1) and who must be listed on the quarterly reports as active lobbyists (LD-2).

The commitments undertaken by covered appointees include the following:

- 1) The appointee may not “accept gifts from registered lobbyists or lobbying organizations during the duration of [his or her] service as an appointee.”¹⁷⁶
- 2) If an appointee was a registered lobbyist within two years prior to appointment, he or she may not, for two years after appointment, participate as a government official in any particular matter on which he or she lobbied during the two years prior to appointment; “participate in *the specific issue area*[¹⁷⁷] in which that particular matter falls”; or “seek or accept employment with any executive agency that [he or she] lobbied within the [two] years before the date of . . . appointment.”¹⁷⁸
- 3) “[U]pon leaving [g]overnment service,” the appointee may not “lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.”¹⁷⁹

Waivers of the restrictions thereby imposed are authorized,¹⁸⁰ and one was in fact granted for one high-ranked Defense Department official while the ink was barely dry on this new order,¹⁸¹ not the most fortuitous of beginnings.

176. *Id.* § 1 (first commitment of ethics pledge). The relationship of this ban, as well as the recusal and post-employment commitments, to existing law—for example, the extent of overlap with, as well as the differences from, existing requirements—has been and will be explicated in OGE opinions.

177. While the Order does not expressly say so, this reference to “specific issue area” likely refers to the listings of “specific issues” to be lobbied or that were lobbied during a particular quarterly period that are found on the LD-1 and LD-2. *See supra* text accompanying notes 52, 61. The implication of this may be that, in the future, lobbyists hoping to be appointed to the Administration will very narrowly define lobbied issues on their LDA filings to limit disqualification that may otherwise result if they are appointed to positions covered by the pledge. This may actually improve the quality of disclosure mandated by the LDA. *See supra* text accompanying note 53.

178. Exec. Order No. 13,490, § 1, 74 Fed. Reg. 4673 (Jan. 21, 2009) (emphasis added) (third commitment of ethics pledge).

179. *Id.* § 1 (fifth commitment of ethics pledge).

180. *Id.* § 3 (waiver authority reserved to the Director of the Office of Management and Budget or his or her designees).

181. *See Obama’s No. 2 at Pentagon Gets “Ethics Waiver,”* NBC WASH. NEWS, Jan. 24, 2009, available at http://www.nbcwashington.com/news/us_world/McCain-Blasts-Obama-Ethics-Waiver-for-No-2-at-Pentagon-.html.

e. *Presidential Memorandum: Ensuring Responsible Spending of Recovery Act Funds*

On March 20, 2009, President Obama issued another directive, this one not as an executive order, but rather as a memorandum to executive departments and agencies, advising them of various steps to be taken to insure that public funds made available under the American Recovery and Reinvestment Act of 2009 (“the Recovery Act”)¹⁸² are expended “responsibly,” “in a transparent manner,” and on their merits, not “in response to improper influence or pressure.”¹⁸³ Section 3 of that memorandum, entitled *Ensuring Transparency of Registered Lobbyist Communications*, imposes both disclosure obligations and restrictions not found in the LDA or elsewhere with regard to communications made to executive branch officials, including those who are not considered “covered officials” for LDA purposes. A public furor arose immediately upon the issuance of the memorandum. Claims were made, for example, that the directive violated the First Amendment right to petition since it restricted the ability of LDA-registered lobbyists to communicate on behalf of their clients¹⁸⁴ and, in any event, made artificial and purposeless discriminations in its coverage since persons who did not meet LDA registration thresholds but who lobbied for clients were not covered.¹⁸⁵ Ultimately, in July 2009, the Office of Management and Budget issued revised implementation guidance that broadened the coverage of the memorandum in some respects, but narrowed it in others.¹⁸⁶ However, at the end of the day, registration under the LDA¹⁸⁷ is still the touchstone for the applicability of some requirements under the presidential memorandum.

182. American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115.

183. Memorandum from the President to the Heads of Executive Departments and Agencies, Ensuring Responsible Spending of Recovery Act Funds (Mar. 20, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-20-09 (on file with the *McGeorge Law Review*).

184. See, e.g., Alan Fram, *The Influence Game: Obama Limits Stimulus Lobbying*, TUSCON CITIZEN, Mar. 27, 2009, <http://www.tucsoncitizen.com/ss/related/113069> (on file with the *McGeorge Law Review*). For the author’s arguments to the contrary, see William Luneburg, Op-Ed., *The Obama Lobbying Directive: Steps in the Right Direction*, JURIST, Apr. 10, 2009, <http://jurist.law.pitt.edu/forumy/2009/04/obama-lobbying-directive-steps-in-right.php> (on file with the *McGeorge Law Review*).

185. See, e.g., Letter from Melanie Sloan, Executive Dir., Citizens for Responsibility and Ethics in Washington, et al., to Gregory B. Craig, Esq., White House Counsel (Mar. 31, 2009), available at <http://undertheinfluence.nationaljournal.com/ACLU%20et%20al%20Letter%20to%20White%20House.pdf> (on file with the *McGeorge Law Review*) (suggesting, for example, that the ban on lobbyist participation in meetings be replaced by a more broadly applicable requirement for disclosure of communications to executive branch officials with regard to funding applications).

186. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to the Heads of Executive Departments & Agencies, Updated Instructions Regarding Communications with Registered Lobbyists About Recovery Act Funds (July 24, 2009), available at <http://www.ostp.gov/galleries/default-file/OMB%20memo%20July%2024%202009.pdf> [hereinafter Revised Recovery Act Guidance] (on file with the *McGeorge Law Review*).

187. Unlike the Obama Ethics Pledge, there is no definition of a “registered” lobbyist provided in the presidential memorandum of March 20, 2009, or the subsequent OMB guidance, though that term presumably

This is not the place to explore these new Recovery Act limitations in detail; they may represent the future of lobbying regulation and expand to many other government programs¹⁸⁸ or, on the other hand, they may turn out to be an experiment that is ultimately abandoned as unsuccessful¹⁸⁹ or ill-advised. Briefly stated, no one, including LDA-registered lobbyists, may orally communicate with federal agency officials with regard to pending applications for competitive funding made available under the Recovery Act, except with regard to “logistical” questions (e.g., how to apply), or at “widely attended gatherings,” or in several other limited settings.¹⁹⁰ If an LDA-registered lobbyist communicates orally with an official regarding such applications or other matters under the Recovery Act, the agency must post on its Internet site certain information with regard to that communication: the date of and parties to the communication; the name of the lobbyist’s client on behalf of whom the communication was made; a general, short description of the substance of the discussion; and any written materials submitted in conjunction with the discussion.¹⁹¹ Moreover, written communications from LDA-registered lobbyists with regard to Recovery Act funding or policy must be posted on the agency’s website.¹⁹² The disclosures thereby made available to the public go far beyond those currently mandated by

refers only to those persons listed on non-terminated LDA registrations and on quarterly LDA reports (where the registrant has not terminated the lobbyist by listing him or her on Line 23 of the LD-2 form).

188. The Department of the Treasury issued long-awaited restrictions on lobbying with regard to federal government investments in banking and other institutions made available under the Troubled Asset Relief Program (the “bank bailout” legislation); they are similar, but not identical, to the Recovery Act restrictions. See U.S. Dep’t of the Treasury, Communications with Registered Lobbyists and Other Persons About Emergency Economic Act Stabilization Funds, <http://www.financialstability.gov/docs/Lobbying-Guidelines.pdf> (last visited Oct. 26, 2009) (on file with the *McGeorge Law Review*).

189. See, e.g., Rita Beamish, *U.S. Meetings with Lobbyists Go Unreported*, WASH. POST, Aug. 31, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/30/AR2009083002426.html>. It should be noted that the paucity of reported communications by lobbyists with federal agencies does not necessarily indicate that the current policy is either not being followed or is ineffective in serving its purposes. Indeed, it may be proof of its effectiveness in the sense that agencies may have been able to focus on the merits of proposals without the spin provided by politically connected lobbyists. The lack of reports of lobbyist contacts certainly is not inconsistent with the presence of an unusual amount of lobbying activity (which *The Washington Post* story suggests), activity that includes not only the efforts of LDA-registered lobbyists but also the clients themselves, not to speak of all the background work performed by LDA-registered lobbyists not captured (or restricted) by the directives of the Recovery Act memorandum. Indeed, under the revised OMB guidance banning oral communications from all outside persons following the filing of an application for a competitive grant, lobbyists can still compose written presentations to agencies for their clients to sign and, in the process, avoid even the internet posting requirement—which would help account for the lack of reported lobbyist communications since the revised guidance became effective in July 2009. In all events, protests by lobbyists that their clients have been ill-served by the policy have to be taken with a grain of salt given lobbyists’ self-interest in touting the need for their services. More telling would be agency officials’ complaints that they are not receiving the information they need, complaints that, so far, have not been aired publicly if they indeed exist.

190. Revised Recovery Act Guidance, *supra* note 186, at attachment 2-3.

191. *Id.* at 3-4.

192. *Id.* at 4.

the LDA¹⁹³ and, indeed, are consistent with the proposals earlier in this Article for more detailed disclosure under that statute.¹⁹⁴

f. A Final Comment on Definitional Cross-Reference

It should be noted that, with regard to all of these areas where a regulatory regime borrows from the LDA, in particular its definition of “lobbyist,” their coverage may seem deceptively inclusive to those unfamiliar with the LDA. This is because an individual can do a lot of lobbying as that term is commonly understood and still not be an LDA “lobbyist.” As noted previously, lobbying services for a particular client must equal or exceed twenty percent of the individual’s time over a three-month period in order for that person to initially qualify as a “lobbyist” for that client and also in order for him or her to retain that legal status.¹⁹⁵ Moreover, while only two “lobbying contacts” are necessary to qualify an individual as a “lobbyist,” assuming the twenty-percent requirement is met, there are *nineteen* exceptions to that term that permit many public and non-public approaches to decision-makers¹⁹⁶ that the layman might justly consider to be lobbying in the usual sense. And “lobbying contacts” are not present if communications are made to non-covered officials.¹⁹⁷

By the same token, to the extent restrictions apply not only to “lobbyists” but also to “registrants” under the LDA, an entity is not required to register under the LDA in the first place unless it employs at least one “lobbyist.”¹⁹⁸ Accordingly, an organization can do a huge amount of lobbying and avoid registering simply by ensuring that none of its employees meet the twenty-percent requirement.

III. THE “GORILLA” IN THE CLOSET: THE INADEQUACY OF
CURRENT ADMINISTRATION AND ENFORCEMENT

The detail and scope of disclosure currently required by the LDA could be improved in a variety of ways; additional requirements could be added, such as extending the no-impermissible-gift certification and the gift ban to executive branch rules. But even if those changes are ultimately made, without adequate

193. See *supra* text accompanying notes 57-64.

194. See *supra* text accompanying notes 69-79.

195. See *supra* text accompanying note 28. An individual can be a “lobbyist” for one client, but not another.

196. See *supra* text accompanying note 31.

197. See *supra* text accompanying note 30.

198. See *supra* text accompanying note 26. The use of the LDA definitions for a diversity of purposes as described in this Article is not at all uncontroversial. Indeed, there is increasing critical attention being given to this issue, most recently at a symposium dealing with lobbying reform. See Center for American Progress, Symposium: Undue Influence—Improving the Regulation of Special Interest Efforts to Affect Public Policy, Sept. 14, 2009, available at <http://www.americanprogress.org/events/2009/09/undue.html> (on file with the McGeorge Law Review).

LDA administration and enforcement, the purposes of the statute to improve accountability in government and to deter illegal and inappropriate behavior¹⁹⁹ will not be fully realized, nor will the LDA optimally reinforce compliance with other regulatory regimes applicable to federal lobbying. In both the Federal Regulation of Lobbying Act of 1946 (FRLA)²⁰⁰ and the 1995 LDA, Congress refused to relinquish control of the registration and disclosure scheme. The FRLA was never really given much chance to succeed—indeed, it was close to dead on arrival.²⁰¹ Despite the high hopes expressed upon the LDA's enactment,²⁰² vesting responsibility for administration in officers of Congress is severely hampering the statute's prospects for success.

On the theoretical level, the choice of the Secretary of the Senate and the Clerk of the House for administrative duties under the LDA might seem to make some sense. After all, Congress is the object of much of the activity falling within the statute's ambit. As the target of lobbying activities, it certainly has some interest in self-protection and it might, accordingly, seem logical to give that task to persons subject to its control. However, the expansion of disclosure mandates to capture executive branch lobbying undercuts this rationale for the current administrative structure. Dividing responsibility for the LDA between the two branches has little to recommend it. Not only would it lead to duplication of effort and increased costs, but it would also interfere with the public's ability to obtain an overall sense of lobbying campaigns that involve activities directed at both the legislative and executive branches of the government. The coordination of legislative and executive offices to overcome these and other potential difficulties would likely not be forthcoming. Indeed, at times the Secretary and Clerk have themselves failed to work together effectively and, in the process, have created significant problems for LDA filers as well as for those sectors of the public interested in obtaining ready access to data gathered as a result of the LDA's mandates.²⁰³

Having opted to vest administrative duties in one place (though, as it turns out, in two different offices with different methods of operation), Congress could have chosen to make the Secretary and Clerk mere file clerks, accepting documents and making them available to the public in some form. Clearly this

199. See *supra* text accompanying note 21.

200. Federal Regulation of Lobbying Act, 60 Stat. 839 (1946) (codified as amended at 2 U.S.C. §§ 261-270 (1994) and repealed in 1995).

201. For an examination of the provisions and history of the FRLA, see William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, in *THE LOBBYING MANUAL*, *supra* note 17, at 9-15.

202. See, e.g., Senator Carl Levin, *Foreword to the Third Edition*, *THE LOBBYING MANUAL*, *supra* note 17, at vii-ix.

203. For example, prior to HLOGA's enactment, the Clerk's office was much slower than the Secretary's in putting lobbying records on-line for public searches. When the opportunity to file registrations and reports electronically was made available by both offices, it was optional with the Senate and required by the House and, moreover, depended on incompatible software systems. For a discussion of the filing and record search systems in place prior to 2007, see Luneburg & Susman, *supra* note 69, at 54-55.

would not have marked an improvement over the FRLA regime, which was roundly criticized for the lack of guidance on registration and disclosure requirements.²⁰⁴ Moreover, without enforcement authority the statute would have been a paper tiger, a fate suffered by the FRLA. The Department of Justice effectively abandoned efforts to prosecute violations of that statute²⁰⁵ following the Supreme Court's decision in *United States v. Harriss* (1954), which narrowly construed the statute in light of vagueness and First Amendment concerns.²⁰⁶ However, in dealing with the need for both administrative guidance for lobbyists and adequate enforcement authority, Congress was faced with limitations imposed by separation-of-powers principles: Congress cannot constitutionally vest in its own officers the power to enforce the law by, for example, suing in the federal courts.²⁰⁷ Moreover, the constitutional concept of "execution of the law," as it is understood with regard to the President's powers granted in Article II, sweeps far more broadly. For example, in *Bowsher v. Synar*,²⁰⁸ the Supreme Court noted that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."²⁰⁹

In threading the needle, Congress attempted to make the Secretary and Clerk more than mere file clerks and yet somewhat less than a typical executive branch agency charged with implementing a disclosure scheme. Those officers were directed to "provide guidance and assistance on the registration and reporting requirements of [the LDA] and develop common standards, rules, and procedures for compliance."²¹⁰ However, while they in fact issued "guidance" documents,²¹¹ the Secretary and Clerk disclaimed any authority to issue legally binding regulations,²¹² in obvious recognition of the fact that such a power is traditionally vested in executive branch and independent agencies and had been characterized

204. This is reflected in the "Findings" provision of the LDA. See 2 U.S.C. § 1601(2) (2006).

205. See, e.g., William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, in *THE LOBBYING MANUAL*, *supra* note 17, at 14.

206. 347 U.S. 612 (1954).

207. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("The [Federal Election] Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3.").

208. 478 U.S. 714 (1986).

209. *Id.* at 733.

210. 2 U.S.C.A. § 1605(a)(1) (West Supp. 2009).

211. See, e.g., SEC'y OF THE SENATE & CLERK OF THE H.R., LOBBYING DISCLOSURE ACT GUIDANCE NO. 1 (Feb. 12, 1996), available at <http://lobbyingdisclosure.house.gov/index.html> (on file with the *McGeorge Law Review*); SEC'y OF THE SENATE & CLERK OF THE H.R., LOBBYING DISCLOSURE ACT GUIDANCE NO. 2 (June 26, 1996), available at <http://lobbyingdisclosure.house.gov/index.html> (on file with the *McGeorge Law Review*); SEC'y OF THE SENATE & CLERK OF THE H.R., LOBBYING DISCLOSURE ACT GUIDANCE NO. 3 (Jan. 31, 1997), available at <http://lobbyingdisclosure.house.gov/index.html> (on file with the *McGeorge Law Review*); SEC'y OF THE SENATE & CLERK OF THE H.R., LOBBYING DISCLOSURE ACT GUIDANCE (June 9, 2009), available at <http://lobbyingdisclosure.house.gov/index> (on file with the *McGeorge Law Review*).

212. See LOBBYING DISCLOSURE ACT GUIDANCE, *supra* note 37, at 2.

by the Supreme Court in *Buckley v. Valeo* as an authority that could be vested only in “Officers of the United States” not subject to congressional appointment or direct control.²¹³ Indeed, *Buckley* made the same point with regard to the issuance of “advisory opinions.”²¹⁴ As it turns out, whether for fear of provoking a *Buckley/Bowsher* challenge, lack of resources, or simple discomfort with the normal administrative routine of pumping out a steady stream of guidance on complicated issues, the Secretary and Clerk have avoided publishing more than barebones guidance documents that change incrementally with each amendment to the LDA, but fail to offer significant assistance on many important and complex issues raised by the LDA. This is clearly not an optimal situation if the goal is widespread compliance with the LDA. The compliance uncertainties resulting from this inactivity as it affects registrants, lobbyists, and those potentially subject to the statute have been magnified now that the LDA intersects with campaign finance, congressional gift, and executive branch gift regimes. For example, it is not always clear whether the LDA’s applicable provisions require cross-reference to these bodies of law for common definitional approaches or, rather, their own unique interpretative approach.²¹⁵ Unfortunately, the lack of administrative rigor regarding the issuance of adequate guidance clearly creates the impression that lobbying regulation and disclosure are much less important than other regulatory schemes enacted by Congress. Having offered that bleak appraisal, it should be noted that both the Senate and House offices in charge of LDA administration are staffed with truly dedicated, hardworking, creative people who have labored to give effect to the LDA under difficult circumstances.

With regard to “enforcement,” the Secretary and Clerk are given three basic functions, namely to:

- 1) “review, and, where necessary, verify and inquire to ensure the accuracy, completeness, and timeliness of registration and

213. 424 U.S. 1, 140 (1976).

214. *Id.*

215. As an example, both the FECA and the LDA employ the term “contribution” or its variants. *See* 2 U.S.C. § 434(b) (political committee reports of contributions); 2 U.S.C. § 1603(b)(3) (affiliated organization disclosure), § 1604(d)(1) (LD-203 contributions). FECA contains an elaborate definition. *See* 2 U.S.C. § 431(8) (2006). The LDA contains no definition of that term. While, for some purposes, it might be natural to refer to the FECA definition, for example, in the case of reportable LD-203 contributions to candidates and political committees, in other cases, such as contributions from affiliated organizations, the natural reference point is unclear. The failure of the Secretary and Clerk to offer a nuanced definition of the term “control,” another term that is shared by the FECA and LDA, with regard to disclosure of PACs on LD-203’s has already provoked concern. *See* Letter from Jessica Robinson, Associate Gen. Counsel, AFSCME, et al., to Nancy Erickson, Sec’y of the Senate, and Lorraine Miller, Clerk of the H.R. (July 8, 2008), available at <http://electionlawblog.org/archives/HLOGA%20203%20letter%20to%20Congress-3.doc.pdf> (on file with the *McGeorge Law Review*).

reports”²¹⁶—without, however, having subpoena power or “general audit or investigative authority”;²¹⁷

- 2) “notify any lobbyist or lobbying firm in writing that may be in noncompliance with [the LDA]”;²¹⁸ and
- 3) “notify the United States Attorney for the District of Columbia that a lobbyist or lobbying firm may be in noncompliance with [the LDA].”²¹⁹

The minimalist approach evidenced by these timid authorities was clearly mandated by the separation-of-powers principles discussed earlier.

However, that there is only one United States Attorney’s office that has the authority to investigate and charge violations of the LDA does not create much cause for optimism in terms of the possibility for vigorous enforcement. Unfortunately, that impression has not been dispelled by the experience under the LDA since 1995. The paucity of the prosecutorial activity (a handful of cases, all ending in settlements), which first came to light in 2005 after a Freedom of Information Act request had been filed with the Department of Justice,²²⁰ raised questions with regard to how seriously the Department considered LDA violations. Those concerns resulted in a new provision added to the LDA by HLOGA that requires the Department of Justice to semiannually report to the House Committee on the Judiciary, the Senate Committee on Homeland Security and Governmental Affairs, and the Senate Committee on the Judiciary with regard to the aggregate number of enforcement actions taken during the preceding six month period and the sentences imposed.²²¹ In part to provide a context in which to evaluate this information, the Secretary and Clerk are required to “make publicly available, on a semiannual basis, the aggregate number of registrants referred to the United States Attorney for the District of Columbia for noncompliance.”²²²

As required by HLOGA,²²³ in 2008 the Government Accountability Office (GAO) reported on how the United States Attorney for the District of Columbia was organized to deal with judicial enforcement of the LDA.²²⁴ GAO noted that,

216. 2 U.S.C.A. § 1605(a)(2) (West Supp. 2009).

217. 2 U.S.C. § 1607(c) (2006).

218. 2 U.S.C.A. § 1605(a)(7).

219. *Id.* § 1605(a)(8).

220. See Kenneth P. Doyle, *Justice Department Reveals First Cases Settled Under Lobbying Disclosure Statute*, 157 BNA, INC. DAILY REP. FOR EXECUTIVES, Aug. 16, 2005, at A-18.

221. 2 U.S.C.A. § 1605(b) (West Supp. 2009). Note that names and other personal information not otherwise a matter of public record must be withheld. *Id.*

222. *Id.* § 1605(a)(11).

223. *Id.* § 1614.

224. U.S. GOV’T ACCOUNTABILITY OFFICE, LOBBYING DISCLOSURE: OBSERVATIONS ON LOBBYISTS’ COMPLIANCE WITH NEW DISCLOSURE REQUIREMENTS GAO-08-1099 (Sept. 2008) [hereinafter 2008 GAO STUDY].

while the U.S. Attorney's Office had more than 700 personnel (including over 350 Assistant U.S. Attorneys), only five were assigned to LDA enforcement, and they all had other duties in addition to LDA enforcement.²²⁵ Several years might elapse between the Secretary's and Clerk's identification of possible instances of noncompliance and actual referral of a case for possible prosecution.²²⁶ Upon referral, the U.S. Attorney's Office first ascertained from the Secretary's and Clerk's databases whether the alleged violator had brought itself into compliance. If it had not, the Office sent out a letter requesting compliance and, only if no satisfactory response was received, did the Office proceed to the next step in the enforcement process.²²⁷ Since 2004, the Secretary and Clerk had referred more than 4,000 cases to the Office.²²⁸ The most recent set of referrals came in April 2008 (330 referrals at the time of the 2008 GAO study); they related exclusively to the 2006 year-end reporting period and some included multiple violations by the same registrant.²²⁹ The GAO found that the Office did not have a structured process to identify which cases should receive priority, such as in the case of a repeat violator,²³⁰ and its report recommended that the Office develop such a process,²³¹ a recommendation that was apparently being acted upon by the U.S. Attorney at the time GAO issued its report.²³² When GAO issued its second required HLOGA report in the spring of 2009, it noted that the Office had tested a new system responsive to GAO's concerns and hoped to put it into place by April 2009.²³³

The U.S. Attorney's total number of enforcement actions taken, other than noncompliance letters sent, is entirely underwhelming. As of the first GAO report, the Office had settled three cases since 1995, collecting civil penalties of \$47,000.²³⁴ One settlement imposed a three-year ban on lobbying by an individual lobbyist and his firm,²³⁵ a penalty not made expressly available under the LDA. All of those cases involved failure to file, rather than defective filings.²³⁶ DOJ's

225. *Id.* at 15.

226. *Id.* at 16.

227. *Id.*

228. *Id.* at 17. As of October 26, 2009, the Secretary had referred an aggregate of 5,596 cases to the United States Attorney for potential non-compliance. U.S. Senate, Public Disclosure, http://www.senate.gov/legislative/Public_Disclosure/cumulative_total.htm (last visited Oct. 26, 2009) (on file with the *McGeorge Law Review*).

229. 2008 GAO STUDY, *supra* note 224, at 18.

230. *Id.*

231. *Id.* at 19.

232. *Id.* at 18.

233. U.S. GOV'T ACCOUNTABILITY OFFICE, 2008 LOBBYING DISCLOSURE: OBSERVATIONS ON LOBBYISTS' COMPLIANCE WITH DISCLOSURE REQUIREMENTS GAO-09-487 (Apr. 2009) [hereinafter 2009 GAO STUDY].

234. 2008 GAO STUDY, *supra* note 224, at 18.

235. Doyle, *supra* note 220.

236. 2008 GAO STUDY, *supra* note 224, at 18. That total had been the same for the previous three years. See Doyle, *supra* note 220.

first semiannual report of enforcement activity required by HLOGA was all of two pages long. It covered the period from January 1, 2008, to June 30, 2008, and revealed little of significance not otherwise contained in the 2008 GAO report, other than highlighting the fact that the Senate had referred the 330 cases for investigation and possible prosecution in April 2008; the House had referred no cases during the semiannual period in question.²³⁷ The GAO's second HLOGA enforcement report noted that 242 additional referrals had been made by the Secretary for the mid-year 2007 filing period and 42 by the Clerk for the two 2006 filing periods,²³⁸ but the GAO did not indicate any further prosecutorial activity by the U.S. Attorney's Office other than issuance of compliance request letters.²³⁹

Of course, one possible justification for the lack of DOJ enforcement is that LDA cases are simply not that important in the grand scheme of things. However, given HLOGA's increase in the civil penalties available,²⁴⁰ its creation of criminal penalties for LDA violations,²⁴¹ and the new DOJ reporting and GAO auditing responsibilities, it is hard to make the case that Congress now shares that view regarding the comparative unimportance of LDA violations. At the same time, many LDA violations may not involve major infractions justifying the institution of civil or criminal judicial proceedings. Administratively imposed civil penalties, however, are not available under the current enforcement structure,²⁴² though they would clearly be sufficient for punishment and deterrence in many cases and would avoid the need for a major commitment of prosecutorial resources.

In short, at the present time, LDA implementation involves administrative officials serving primarily to collect and make available lobbying data and to offer minimal guidance on compliance,²⁴³ together with several people in one U.S. Attorney's office, who, if they have the time from other tasks, send out non-compliance letters to lobbyists and registrants and try to sort through hundreds of

237. Letter from Keith B. Nelson, Principal Deputy Assistant Att'y Gen., to the Honorable Richard B. Cheney, President, U.S. Senate (Sept. 18, 2008) (on file with the *McGeorge Law Review*).

238. 2009 GAO STUDY, *supra* note 233, at 18. As of October 26, 2009, the Clerk of the House of Representatives had referred an aggregate of 354 cases. See Office of the Clerk, U.S. House of Representatives, Lobbying Disclosure, <http://lobbyingdisclosure.house.gov/index.html> (last visited Oct. 26, 2009) (on file with the *McGeorge Law Review*).

239. 2009 GAO STUDY, *supra* note 233, at 16-19. The GAO noted that one additional staff member had been assigned by the Office to LDA compliance and that "three attorneys from the affirmative civil enforcement division may become involved in enforcement efforts, as needed." *Id.* at 19.

240. The penalty increased from \$50,000 to \$200,000 per violation. See 2 U.S.C.A. § 1606(a) (West Supp. 2009).

241. *Id.* § 1606(b).

242. The Clerk and Secretary could not be given the power to impose such penalties in light of *Buckley* and *Bowsher*, and that power is not customarily vested in the Department of Justice, let alone individual U.S. Attorneys' offices.

243. While some sectors of the lobbying community apparently feel that LDA requirements are reasonably clear, GAO reports on the LDA's administration indicate confusion on the part of others. See 2008 GAO Study, *supra* note 224, at 13-15; 2009 GAO STUDY, *supra* note 233, at 13-15.

periodic referrals for possible cases to prosecute. This situation must be improved and that has to be accomplished by legislation.

Specifically, administration of the LDA should be taken from the Secretary and Clerk and vested in an independent agency that can adopt binding and, where appropriate, nonbinding rules, as well as issue necessary advisory opinions to insure that the lobbying community is not confused regarding what its obligations are under the law. That agency should be granted the power to subpoena and audit books and records of registrants and listed lobbyists.²⁴⁴ It should also have the authority to impose civil penalties following an administrative hearing, as well as the authority to refer appropriate cases to the Department of Justice, not just to the U.S. Attorney for the District of Columbia, for possible civil and criminal enforcement in any appropriate federal judicial district.²⁴⁵

The Department of Justice currently administers another disclosure scheme dealing with lobbying Congress and executive officials: the Foreign Agents Registration Act.²⁴⁶ Given the exception from required FARA registration for lobbying by foreign commercial entities,²⁴⁷ the focus of that regime today is largely on lobbying by foreign governments and foreign political parties. That implicates national security and foreign policy interests that justify DOJ's continued retention of FARA administration. By the same token, the comparative absence of those interests when it comes to lobbying subject to the LDA, along with the symbolic and other values of neutrality achieved by separation from both the executive and legislative branches, suggests looking beyond DOJ for an institution in which to vest LDA administration. Similarly, achievement of those values argues against transfer of the Clerk's and Secretary's responsibilities to the Office of Government Ethics, another executive branch agency.²⁴⁸ While section 203 of HLOGA has expanded the LDA to encompass executive ethics compliance to some extent,²⁴⁹ enlargement of OGE's responsibilities to include congressional gift and campaign finance issues would, essentially, amount to the tail wagging the dog. That expansion would also necessarily dilute OGE's ability

244. The LDA does not contain any requirement that registrants and listed lobbyists maintain records to substantiate any of the information reflected in the required registration and report forms. GAO audits of those forms, as filed with the Secretary of the Senate and Clerk of the House, have indicated that lack of documentary support is a significant problem. *See, e.g.*, 2009 GAO STUDY, *supra* note 233, at 7-11; *id.* at 8-9 (estimating, for example, "that lobbyists were unable to provide documentation for one or more elements [of required information] on about [65%] of the lobbying activity disclosure reports . . . [the GAO] reviewed"). Congress should amend the LDA to mandate record-keeping to insure that reports can be corroborated by reliable documentation.

245. For example, some registrants may not do business primarily in the District of Columbia.

246. 22 U.S.C. §§ 611-621 (2006), *amended by* HLOGA, Pub. L. No. 110-81, § 212, 121 Stat. 735, 749 (2007) (discussed *supra* in text accompanying notes 90-104).

247. *See supra* text accompanying note 96.

248. U.S. Office of Gov't Ethics, <http://www.usoge.gov> (last visited Aug. 18, 2009) (on file with the *McGeorge Law Review*).

249. *See supra* text accompanying notes 87, 124-37.

to insure adequate attention to issues of executive branch ethics, a crucial matter in its own right that implicates far more than lobbying pressures directed at governmental decision-making.²⁵⁰

As a matter of history, it should be noted that, when the LDA was being considered in the early 1990s, both DOJ and OGE resisted suggestions that they be assigned administrative responsibilities.²⁵¹ OGE felt, for example, that it was too poorly equipped to do the job required and DOJ saw itself primarily as an enforcement agency, as opposed to an agency focused on disclosure.²⁵² Newly created institutions were unsuccessfully proposed for LDA administration in the early 1990s.²⁵³ However, that a particular reform, such as transferring LDA administration outside of Congress, has been made and defeated in the past does not establish its unworthiness. Experience with the current assignment of responsibilities will likely confirm that change is indeed required in order to insure that the LDA achieves its full potential.

To avoid both starting entirely from scratch and creating a new bureaucracy whose functions would overlap to some degree with the jurisdiction of an existing institution, the Federal Election Commission would seem the natural agency to assume the Clerk's and Secretary's LDA functions. The FEC currently administers an important disclosure scheme related to the political process, one that, after HLOGA, importantly intersects with lobbying regulation at various

250. Even within its currently assigned role, the OGE has been subject to criticism. *See, e.g., Executive Branch Reform Act of 2007: Hearing Before H. Comm. on Oversight and Gov't Reform*, 110th Cong. (2007) available at <http://oversight.house.gov/documents/20070213122838-84277.pdf> (testimony of Craig Holman, Legis. Rep., Public Citizen).

Nevertheless, OGE is weak and falls far short on its assignment to assure the independence of federal decision-makers. OGE's primary flaw is that it lacks enforcement authority. It acts primarily as an advisory "partner," offering guidelines and ethics training to the executive branch, rather than as a watchdog that determines and implements ethics codes for the executive branch. Its core responsibilities are essentially diffused throughout the federal government, undermining its mission. Its rules are subject to interpretation—and dilution—by the ethics officers of each separate executive branch agency.

Id.

251. *See, e.g., S. REP. NO. 103-37*, at 36 (1993) (OGE Director testified that responsibility for lobbying disclosure would detract from dealing with issues of executive branch ethics); *see also* Holman, *supra* note 6, at 12.

252. *See* Holman, *supra* note 6, at 12. Interestingly, one of the early Senate bills gave jurisdiction for LDA administration to the DOJ in the face of concerns that the DOJ might be too aggressive in enforcement, resulting in a chilling effect on First Amendment rights. *See S. REP. NO. 103-37*, at 36 (1993).

253. The House amendment to S. 349, 103d Cong. (1994) (a bill leading to the ultimate enactment of the LDA), which went to conference in 1994, proposed an independent agency, the Office of Lobbying Registration and Public Disclosure, in contrast to the Senate's suggested placement of that entity within the Department of Justice. The conference version of the bill (which was not enacted) opted for the House approach. *See H.R. REP. NO. 103-750*, at 56 (1994) (Conf. Rep.).

During the congressional consideration of bills to reform lobbying and ethics regulation in the aftermath of the Abramoff controversy, one of the proposals was to create an "independent" entity within Congress for LDA administration—an odd creation indeed, one whose independence in practice would be highly questionable given the pressures that would inevitably be applied to its activities. *See H.R. 422*, 110th Cong. (2007).

crucial points.²⁵⁴ Indeed, in 1993, during congressional hearings that led to the LDA's enactment, the Chairman of the FEC indicated the agency's willingness to assume the registration and disclosure functions.²⁵⁵ The FEC has been a prolific issuer of regulations and guidance over the years and does engage in various enforcement activities. Unfortunately, it has been roundly criticized for the cumbersome nature of its enforcement mechanism and its general lack of aggressiveness and effectiveness.²⁵⁶ But in light of the amounts of money lavished on federal political campaigns and lobbying in recent years—along with the synergistic effects of those activities—now is the ideal time to engage in a radical rethinking of how the FEC should be restructured and strengthened to do its job adequately, including its possible absorption of responsibility for administration and enforcement of the LDA.²⁵⁷

Whatever agency undertakes LDA administration, and even if no change is made to the current allocation of responsibilities among the Clerk, Secretary, and United States Attorney for the District of Columbia, Congress should at least consider incorporating citizen enforcement into the mix. Since the 1970s, citizen suits to obtain injunctive relief and impose civil penalties on violators of federal law, along with authorization for attorney's fees, have become commonplace mechanisms utilized to help keep regulated entities serious about compliance and the regulators themselves alert to their prosecutorial responsibilities, as well as to compensate for the lack of sufficient resources to allow adequate governmental enforcement.²⁵⁸ There is no reason to think they could not serve the same deterrence and backstop functions in the area of lobbying regulation while, at the same time, avoiding unnecessary burdens on First Amendment interests.

Standing to sue can be a problem in some citizen suit contexts, though the Supreme Court has recognized that the public's interest in obtaining information required under a federal disclosure scheme is sufficient to satisfy Article III injury-in-fact requirements.²⁵⁹ Compliance with congressional and executive branch gift rules, however, might be viewed as areas where the government has

254. See *supra* text accompanying notes 86, 138-45, and 153-71.

255. See Holman, *supra* note 6, at 12.

256. See, e.g., PROJECT FEC, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION'S CAMPAIGN FINANCE LAWS (2002), available at <http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7BA0902E71-61C3-4F9D-A200-9A3535081D6B%7D.PDF> (on file with the *McGeorge Law Review*); see also Lauren Eber, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155 (2006). For an entirely different view, see Bradley A. Smith & Stephen M. Hoerstring, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145 (2002).

257. For recent lobbying income and expenses, see *supra* text accompanying note 2. For FEC summaries of campaign finance information, see Federal Election Commission, Campaign Finance Summary Releases, available at <http://www.fec.gov/press/press2004/summaries2004.shtml> (last visited June 6, 2009) (on file with the *McGeorge Law Review*).

258. See, e.g., James R. May, *Foreword to Environmental Citizen Suits at Thirtysomething: A Celebration & Summit Symposium*, 10 WIDENER L. REV., at i (2003).

259. See *FEC v. Akins*, 524 U.S. 11, 19-25 (1998).

the primary interest and should, therefore, maintain a monopoly of enforcement authority. If such views were rejected, however, and where a citizen suit pertained to, for example, violation of congressional gift rules as to which it might be more difficult to identify a "citizen's" injury for standing purposes, a *qui tam* action may eliminate that hurdle.²⁶⁰

One of the objections that might be raised with regard to the citizen suit remedy is its potential *in terrorem* effect. Deterring what may be entirely appropriate lobbying activity is not an unimportant concern in light of the First Amendment protection of the right to petition. However, this problem may be mitigated in various ways. For example, with regard to various registration and reporting violations, a suit could be statutorily foreclosed if the alleged offender files the required form or an amendment that provides all the required information within, say, thirty days after notice by the potential plaintiff of the alleged violation. Diligent prosecution by governmental enforcers could preempt the filing and even the on-going prosecution of a citizen suit. These types of limits on citizen suits are commonplace now.²⁶¹ A more far-reaching, and perhaps controversial, limitation would bar a citizen suit upon a public finding by the enforcement agency that no violation of applicable law had occurred, that the alleged violator had "substantially" complied with the law, or that commencement of a formal enforcement action was otherwise inappropriate in light of the nature of the violation at issue. While such a defense to citizen enforcement could potentially undercut the role of third parties in backstopping an overly timid agency, the additional requirement for a public explanation for the agency's finding would at least inject some accountability into the enforcement system; a series of weak explanations could provide fertile ground for public investigation and criticism, as well as for congressional inquiry.

Attorney's fees might be limited to those cases that result in a formal judgment or consent decree in favor of the plaintiff,²⁶² though the combination of such a condition on recovery with the ability of the enforcement agency to stop an action by mere public finding and explanation could possibly deter citizen suits in the first place. In all events, authorization of citizen enforcement should be accompanied by an assurance of more detailed and extensive administrative guidance than currently exists for the regulated community with regard to the

260. See *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771-78 (2000). The Supreme Court resolved only the standing (Article III) issue in this case, leaving for another day the Article II issues presented by *qui tam* actions. See, e.g., Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381 (2001); Nancy Gausewitz Berner, *The Uninjured Plaintiff: Constitutional Standing of Qui Tam Plaintiffs After Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 35 U.S.F. L. Rev. 783 (2001).

261. See, e.g., Clean Water Act, 33 U.S.C. § 1365 (2006) (requiring on-going violation at the time suit is filed and preempting citizen suits where the government has commenced a diligent prosecution of the defendant).

262. See, e.g., *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Servs.*, 532 U.S. 598 (2001).

regulated community's responsibilities under the LDA. This is necessary to insure fair notice of what the law is before enforcement action is taken. Related to that, more administrative guidance is required to avoid the potentially conflicting interpretations by the district and appellate courts with regard to the meaning of the LDA that will inevitably arise if citizens have a choice of venue for enforcement actions.²⁶³

IV. CONCLUSION

Either lobbying regulation is undertaken as a serious endeavor that demands adequate disclosure, related obligations, and adequate structures for administration and enforcement—or it exists simply as window-dressing, offering the appearance, but not the reality, of protection for our system of representative government. The LDA has gradually evolved to the point that it now occupies a central role among the laws that seek to control the perceived excesses of lobbying. But more can, and should, be expected of Congress in filling the important gaps in the statutory regime and in creating the institutional means to insure that the expressed purposes of the LDA exist as more than mere words in the United States Code.²⁶⁴

263. Record-keeping requirements applicable to LDA registrants and lobbyists would also have to be added to the LDA to insure that citizen enforcers can obtain documentation of violations. *See supra* note 244.

264. For a further analysis of various defects in the LDA scheme—written prior to HLOGA, but highlighting important weaknesses that remain today—see Luneburg & Susman, *supra* note 69.